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No. 80 - 6322

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1980

DOYLE EDWARD SKILLERN,
Petitioner,

VS.

THE STATE OF TEXAS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

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QUESTIONS PRESENTED

1. Whether petitioner was denied his right to effective counsel in this capital case, guaranteed by the Sixth, Eighth and Fourteenth Amendments, when the trial court, three weeks before the trial was to begin, substituted a new defense counsel for the one who had ably served petitioner in the prior trial and appeal, denied a motion for continuance designed to give the new counsel time to prepare, and denied an alternative motion for the prior counsel to be appointed as co-counsel.

2. Whether the trial court's error in admission of testimony by a pathologist on the question of whether there was a probability that the petitioner would commit criminal acts of violence that would constitute a continuing threat to society severly undermined the fairness and reliability of the fact finding process at the penalty phase and thereby violated petitioner's rights under the Eighth and Fourteenth Amendments.

3. Whether the admission into evidence of an indictment, where the final conviction for a lesser offense was available, severly undermined the fairness and reliability of the fact finding process at the penalty phase and thereby violated petitioner's rights under the Eighth and Fourteenth Amendments.

4. Whether the death penalty is disproportionately severe and therefore unconstitutional under the Eighth and Fourteenth Amendments when applied to an individual who has not taken life, attempted to take life, or intended to take life.

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

Petitioner Doyle Edward Skillern respectfully prays that a writ of certiorari issue to review the judgment of the Texas Court of Criminal Appeals in this case.

CITATION TO OPINIONS BELOW

The majority and dissenting opinions of the Texas Court of Criminal Appeals are reported at 609 S.W.2d 762 and are attached hereto as Appendix A.

JURISDICTION

The judgment of the Texas Court of Criminal Appeals was entered on September 10, 1980. A timely petition for rehearing was denied on December 10, 1980. On February 3, 1981, Justice Powell granted petitioner's motion to extend the time to file this petition. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3), petitioner having asserted below and asserting herein deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Sixth Amendment to the Constitution of the United States, which provides in relevant part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

and the Eighth Amendment to the Constitution of the United States, which provides in relevant part:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

and the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

2. This case also involves the following provision of the Texas Code of Criminal Procedure:

> §37.071. Procedure in capital case.
>
> (a) Upon a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment. The proceeding shall be conducted in the trial court before the trial jury as soon as practicable. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Texas. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.
>
> (b) On conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

(c) The state must prove each issue submitted beyond a reasonable doubt, and the jury shall return a special verdict of "yes" or "no" on each issue submitted.

(d) The court shall charge the jury that:

(1) it may not answer any issue "yes" unless it agrees unanimously; and

(2) it may not answer any issue "no" unless 10 or more jurors agree.

(e) If the jury returns an affirmative finding on each issue submitted under this article, the court shall sentence the defendant to death. If the jury returns a negative finding on any issue submitted under this article, the court shall sentence the defendant to confinement in the Texas Department of Corrections for life.

(f) The judgment of conviction and sentence of death shall be subject to automatic review by the Court of Criminal Appeals within 60 days after certification by the sentencing court or the entire record unless time is extended an additional period not to exceed 30 days by the Court of Criminal Appeals for good cause shown. Such review by the Court of Criminal Appeals shall have priority over all other cases, and shall be heard in accordance with rules promulgated by the Court of Criminal Appeals.

STATEMENT OF THE CASE

On October 24, 1974, Patrick Randel, a narcotics agent for the Texas Department of Public Safety, was found shot to death in his locked car at a roadside park in Live Oak County, Texas. Agent Randel had been working undercover for the purpose of purchasing illegal drugs

from petitioner Doyle Edward Skillern and his co-defendant, Charles Victor Sanne. Randel's money, gun, diamond ring, and some credit cards were missing.

Randel had last been seen by other Department of Safety agents at 7:10 p.m., October 23, 1974, when he left a motel room in Beeville accompanied by both petitioner and Sanne. Randel left the state money which was to be used in purchasing the illegal drugs in the motel room. He then departed in his (the deceased's) car with Sanne. Petitioner Skillern left in the car in which he and Sanne had arrived. At approximately 8:10 p.m. the car petitioner Skillern had driven returned and Sanne was seen entering Randel's motel room.

Petitioner Skillern and Sanne were arrested early the next morning, October 24, in McAllen, Texas. Petitioner Skillern had the state purchase money in his possession, and Sanne had Randel's credit cards and other effects in his possession. The diamond ring was found in the seat of the vehicle which transported petitioner Skillern to jail.

The physical evidence introduced during the trial clearly demonstrated that it was Sanne who had been the "trigger man," and this was the state's position throughout the trial.

Further, Sanne testified that he was, in fact, the person who had done the shooting and that petitioner Skillern was not in the car at the time the shooting took place.

At the first trial, both petitioner Skillern and Sanne were convicted of capital murder. Punishment was assessed at death for petitioner and life imprisonment for Sanne. On appeal to the Texas Court of Criminal Appeals, the judgment was reversed on the ground that the trial court had erred in allowing the jurors to separate after the court's charge had been read to them in the guilt phase. 559 S.W.2d 828, 833 (1977). Petitioner Skillern's counsel at both the trial and appellate levels was Douglas Tinker.

Three weeks before the second trial began the trial court relieved Skillern's counsel, Douglas Tinker, who had ably defended him in the earlier proceedings, and replaced him with David Connery. No reason was given for this sudden change in court-appointed defense counsel, other than the court's comment "we don't need any city lawyers to handle this case." It should be pointed out that the first trial of this cause was in George West, Live Oak County, Texas; for the second trial venue was changed to Rockport, Aransas County, Texas. Tinker's office is in Corpus Christi, the largest city in the region; Connery's office at the time was in Rockport.

Prior to the change of venue, petitioner filed in writing with the clerk's office of the Texas Court of Criminal Appeals a pro se document requesting that his first trial and appellate attorney continue to represent him in the trial of the case. Petitioner's then attorney also wrote a letter to the court indicating his willingness to continue in the case. However, the said Douglas Tinker

was discharged from the case. Petitioner, in a continued effort to prevent the discharge of Douglas Tinker, filed a pro se application in the Federal District Court in Corpus Christi, Texas, requesting that the State trial court be ordered to continue Douglas Tinker as his attorney. Such application was denied and properly so; however, it does demonstrate petitioner's efforts to have his original appointed attorney represent him. (Copies of Petitioner's pro se submissions to the state and federal courts are attached as Appendix B.)

In this regard, it should be pointed out that the attorney Douglas Tinker was petitioner's appointed attorney when he was tried for murder with malice and convicted of murder without malice in Nueces County in 1972. (See Point III, supra.) This is the prior conviction reflected by State's exhibits 74, 75 and 76 and testified to by the then prosecuting attorney Thomas McDowell. (Statement of Facts, Vol. XIV p 2,765.)

Once the case was transferred to Rockport, Texas, a pretrial hearing was had wherein petitioner continued to make efforts to get Douglas Tinker back involved in the case (SF Vol. II p 27) by filing a motion for additional counsel with a specific request for Douglas Tinker. (SF Vol. II p 29.)

The court denied petitioner's motion for a continuance (attached as Appendix H) designed to permit Connery time to prepare an adequate defense and familiarize himself with the case, and also denied an alternative motion

seeking appointment of Tinker as co-counsel. At the hearing on petitioner's request for continuance, it was pointed out by petitioner's attorney that the first time he had ever talked to petitioner was February 20, 1978 and that the case was set for trial March 13, 1978. (SF Vol. II pp 34-35.) The record was further made to reflect that March 8, 1978, just five days prior to the trial's beginning, was the first occasion that petitioner's attorney had had to review the record from the prior trial.

In demonstrating his lack of preparedness and lack of time to prepare, petitioner's attorney caused the record to reflect that there was not one witness subpoenaed by the State who lived anywhere near Rockport, Texas (SF Vol II p 37) and that there were at least fifty witnesses.

It is interesting to note that the State took no position concerning the motion for continuance. (SF Vol II p 44.)

On March 13, 1978, when the case was called for trial, petitioner again urged his motion for continuance, setting out all of the preparation problems he had had. (SF Vol II pp 145, 146 & 175.) After a lengthy jury selection process and before the evidence began, petitioner again re-urged his continuance request. (SF Vol VIII pp 1594, 1595, 1596 and 1617.) The court also denied petitioner Skillern's motion for severance. Both Skillern and Sanne were once again convicted of capital murder.

Both petitioner and Sanne were sentenced to death at the conclusion of the penalty phase of the second trial. However, Sanne's death sentence was set aside on appeal

on the ground that his sentence at the first trial constituted an acquittal of the death penalty, thereby barring a death sentence at the second trial on double jeopardy grounds.

At the guilt phase of the second trial Sanne took the stand in his own behalf and admitted shooting the deceased, claiming that he had done so in self-defense. In the punishment phase the court admitted the testimony of Dr. Joseph C. Rupp, a practicing forensic pathologist, to render an expert opinion under a hypothetical fact situation based on the evidenced introduced, that "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." The court also admitted an indictment alleging that petitioner had committed murder with malice in the 1972 death of his brother, whereas defendant had been found guilty of murder without malice.

In his instruction to the jury, a copy of which is attached as Appendix C, the court instructed the jury concerning parties to a crime and in so doing permitted the jury to convict petitioner if he acted as a party with anyone, not that he must be acting as a party with the co-defendant Sanne. (Transcript p 243.)

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

1. Petitioner's first ground of error in the Texas Court of Criminal Appeals asserted that the failure of the trial court to grant his motion for a continuance rendered the assistance of his counsel ineffective. Petitioner also argued that denial of his motion to appoint

the attorney who had ably represented him in prior proceedings as an alternative to a continuance denied him the effective assistance of counsel. The Texas court rejected these claims. A. 15-16; 609 S.W.2d at 776-77.

On appeal to the Court of Criminal Appeals of Texas, the first ground of error urged was the denial of a continuance. Petitioner's appellate brief #78-772, p 2 through p 4. Ground of error no. 2 complained of the court's refusal to have additional counsel, and particularly Douglas Tinker, appointed. Brief pp 4-5. At p 5 of such brief, petitioner cited to the Court of Criminal Appeals petitioner's writ of mandamus filed in the state court and petitioner's temporary restraining order and injunction request filed in federal court, all seeking Douglas Tinker's participation in the case. See Petitioner's Appellate Brief pp 1-5, here attached as Appendix D.

2. Petitioner urged that the admission of the pathologist's testimony on the question of future dangerousness was reversible error because the trial court could not have found him qualified to render an expert opinion and admission of this evidence denied petitioner his right to due process guaranteed by the Fourteenth Amendment. The Texas Court of Criminal Appeals agreed that this was error, but found that the error was harmless. A. 12-13; 609 S.W.2d at 773-74.

3. On original appeal, petitioner complained in his fifteenth ground of error, Brief pp 19, 20, 21, and 22, of Dr. Rupp's testimony. Appendix E.

4. Petitioner contended that the admission of the indictment alleging murder with malice where the final conviction was available and was for a lesser offense, murder without malice, was improper and resulted in a

denial of his right to due process of law. The court upheld the admission of this evidence. A. 12; 609 S.W.2d at 773.

5. In his appellate brief in the Court of Criminal Appeals at pp 35-36, Appendix F, petitioner complained of the trial court's action as stated above and while not specifically put in due process language, it clearly reflects a due process complaint.

6. Petitioner contended that the death penalty is disproportionately severe and therefore unconstitutional under the Eighth Amendment for one who has not taken life, attempted to take life, or intended to take life. The court rejected this argument. A.14; 609 S.W.2d at 775. Petitioner's brief pp 6-7 raised the issue of the constitutionality of the state statutes in his fourth ground of error. Appendix G.

REASONS FOR GRANTING THE WRIT

I.

PETITIONER WAS DENIED HIS RIGHT TO EFFECTIVE COUNSEL AS GUARANTEED BY THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BY DENIAL OF A MOTION FOR CONTINUANCE AND, IN THE ALTERNATIVE, FOR APPOINTMENT OF CO-COUNSEL WHERE THE JUDGE HAD, THREE WEEKS BEFORE TRIAL, SUBSTITUTED A NEW ATTORNEY FOR ONE FAMILIAR WITH THIS COMPLEX DEATH PENALTY CASE.

Three weeks before the trial was to begin, the trial court appointed David Connery, an attorney unfamiliar with this case (and death penalty litigation), to replace Douglas Tinker, an experienced trial attorney who had handled petitioner's case in the first trial and won reversal in the Texas Court of Criminal Appeals. The

trial court gave no explanation for this change. Petitioner made a motion for a continuance so that Connery could properly familiarize himself with the facts and legal arguments in this complex capital case and make the necessary investigations and preparations, and, in the alternative, a motion for the appointment of Tinker as co-counsel. The trial court denied both requests, resulting in the deprivation of petitioner's right to effective counsel.1/

A. Effective Assistance of Counsel

This Court has long held that the Sixth Amendment right to counsel and the Fourteenth Amendment guarantee of due process of law are not satisfied by the mere pro forma assistance of counsel. Instead these constitutional mandates are a substantive guarantee of effective representation. Powell v. Alabama, 287 U.S. 47, 71 (1932); Avery v. Alabama, 308 U.S. 444, 446 (1940). The right to effective assistance of counsel includes sufficient time for thorough investigation and preparation because these are essential to the effective representation of counsel. Powell, supra, 287 U.S. at 57. Indeed, in the Third and Fourth Circuits, the late appointment of counsel is considered inherently prejudicial and sufficient to make out a prima facie showing of denial of effective counsel because of this pressing need for time for preparation and investigation. United States ex rel. Mathis v.

1/ Connery served as petitioner's attorney before both the trial court and the Texas Court of Criminal Appeals. A near-fatal automobile accident prevented him from further participation in this case, and Tinker was reappointed.

Rundle, 394 F.2d 748, 752 (3rd Cir. 1968); Twiford v. Peyton, 372 F.2d 670, 673 (4th Cir. 1967). It seems logical that where

> the trial court [has failed] to appoint counsel sufficiently in advance of trial to prepare defendant's case in a reasonably thorough manner, and . . . defendant . . . [establishes] a prima facie case that the hasty appointment of legal assistance may have been inherently prejudicial to his trial by precluding him from the advantage of an adequately prepared defense, then . . . the state should bear the brunt of rebutting the presumption of injury inherent in its skimpy compliance with the sixth amendment command.

Rundle, supra, 394 F.2d at 753.

The standards for determining whether the representation of counsel has been so ineffective because of inadequate preparation are different in other circuits. According to the D.C. Circuit, "a defendant is entitled to the reasonably competent assistance of an attorney acting as his diligent conscientious advocate," United States v. DeCoster, 487 F.2d 1197 (D.C. Cir. 1973) and the government has the burden of establishing a lack of prejudice. Id. at 1204. Both the Fifth and Seventh Circuits require that the attorney simply meet minimum professional standards. Gandy v. Alabama, 569 F.2d 1318 (5th Cir. 1978); United States ex rel. Williams v. Twomey, 510 F.2d 634, 640 (7th Cir. 1975), cert. denied 423 U.S. 876 (1975). The Eighth Circuit demands that the trial counsel exercise "the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances," United States v. Easter, 539 F.2d 663, 666 (8th Cir. 1967). The Ninth Circuit requires that the counsel be "reasonably likely to render and [actually]

rendering reasonably effective assistance." Brubaker v. Dickson, 310 F.2d 30, 37 (9th Cir. 1962). The Tenth Circuit standard is the hardest to meet, that the counsel conduct the defense in such an "incompetent or inadequate manner as to render the trial a sham and a mockery of justice which shocks the conscience of the court." United States v. Fitts, 576 F.2d 837 (10th Cir. 1978).

In light of the fact that the judge in this case substituted a new attorney for one familiar with the case shortly before the trial was to begin and that the very life of the petitioner is at stake, this Court should grant certiorari to decide whether the standard set by the Third and Fourth Circuits should be adopted.

B. Denial of a Continuance

Courts have set separate standards for the ineffective assistance of counsel where it results from the denial of a continuance requested to obtain time for preparation and investigation. In this case there is no question but that the denial of David Connery's motion for a continuance rendered him unable to properly prepare petitioner's case.

In Unger v. Sarafite, 376 U.S. 575 (1963), this Court upheld the denial of a continuance, but, in illuminating dicta, commented that, although the matter of a continuance is within he traditional discretion of the trial judge, "myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality." Id.

at 589; see also Avery v. Alabama, supra, 308 U.S. at 446. The Court in Unger found that five days was sufficient time to hire counsel and prepare a defense where the evidence was fresh, the issues limited and well-defined, and the motion for continuance had not been made until the day the trial was scheduled. 376 U.S. at 590. In petitioner's case, the facts are almost the antithesis of those in Unger: the evidence of the 1975 murder was no longer fresh by 1978, the issues were numerous and extremely complex, and the motion for a continuance was made in writing soon after the substitution of counsel (transcript, pp 83-88) and filed March 3, 1978. It is further submitted that its timeliness was never an issue and the State took no position concerning the granting of it. See motion, Appendix H.

Furthermore, Unger did not involve the possible imposition of the death sentence. This court has long required more stringent standards of review where the ultimate penalty may be imposed. In Stein v. New York, 346 U.S. 156, 196 (1953), Justice Jackson wrote for the Court that "[w]hen the penalty is death, we, like State court judges, are tempted to strain the evidence and even, in close cases, the law in order to give a doubtfully condemned man another chance." Several years later in Reid v. Covert, 354 U.S. 1, 77 (1951), Justice Harlan said:

> So far as capital cases are concerned, they stand on quite a different footing than other offenses. In such cases the law is especially sensitive to demands for . . . procedural fair-

> ness . . . I do not concede that whatever process is 'due' an offender faced with a fine or a prison sentence necesarily satisfies the requirements of the Constitution in a capital case. The distinction is by no means novel, compare Powell v. Alabama, 287 U.S. 45, with Betts v. Brady, 316 U.S. 455; nor is it negligible, being literally that between life and death.

More recently, this Court has pointed out that, "the penalty of death is qualitatively different from a sentence of imprisonment, however long. ... Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion)(footnotes omitted). See also, e.g., Lockett v. Ohio, 438 U.S. 586, 604 (1978)(plurality opinion); Beck v. Alabama, 447 U.S. 625, 637-38 & n. 13 (1980).

The effective assistance of counsel, perhaps more than any other single aspect of a criminal trial, is indispensable to "a fair trial and the reliability of the truth determining process." Schneckloth v. Bustamonte, 412 U.S. 218, 236 (1973). See also Holloway v. Arkansas, 435 U.S. 475, 489 (1978); Caraway v. Beto, 421 F.2d 636, 637-38 (5th Cir. 1970). Because whether an individual is sentenced to death or life imprisonment should not depend on the quality of his attorney's performance, claims of ineffective representation must be examined very carefully where the possible penalty is death. See, e.g., Voyles v. Watkins, 489 F. Supp. 901, 910 (N.D. Miss. 1980)(courts must "strictly scrutinize counsel's conduct" in death cases); Smotherman v. Beto, 276 F. Supp. 579, 586 (N.D. Tex. 1967).

Many courts have found that the denial of a continuance may deprive a defendant of his right to effective counsel and thereby violates his constitutional rights under the Sixth and Fourteenth Amendments. See, e.g., Gandy v. Alabama, 569 F.2d 1318 (5th Cir. 1978); McBee v. Boynar, 296 F.2d 235 (6th Cir. 1961). There are two conflicting standards which have been applied to determining whether the denial of a continuance has deprived the defendant of his right to effective counsel. The majority rule requires a showing of an abuse of discretion and of prejudice caused by the denial of the continuance. United States v. Rastelli, 551 F.2d 902, 908 (2nd Cir. 1977), cert. denied, 434 U.S. 832 (1977); United States v. Houde, 596 F.2d 696 (5th Cir. 1979), reh. denied, 604 F.2d 671 (5th Cir. 1979), cert. denied, 444 U.S. 965 (1979); United States v. Faulkner, 538 F.2d 724, 729 (6th Cir. 1976), cert. denied, 429 U.S. 1023 (1976). The Tenth Circuit requires that there be an abuse of discretion and that denial of the continuance result in manifest injustice, United States v. Olivas, 558 F.2d 1366 (10th Cir. 1977), cert. denied, 434 U.S. 866 (1977), which is a much stricter standard than a required showing of prejudice.

In Gandy, the Fifth Circuit listed several criteria to be taken into consideration in determining whether there had been an abuse of discretion in the denial of a continuance, including: length of requested delay; whether other continuances had been requested or granted; the balance of convenience and inconvenience to the litigants, witnesses, opposing counsel, and the court; and whether the requested delay is for a legitimate reason or

simply for the purpose of delay or contrivance. Gandy, supra, 569 F.2d at 1324. In this case, the delay asked was reasonable (no other continuances had been granted, at least to Connery); little inconvenience was posed for other litigants, witnesses, opposing counsel, and the court; and, the urgent need for more time for preparation and investigation of the numerous, complex issues involved in this serious case presented a clearly legitimate reason for the continuance.

The Texas Court of Criminal Appeals found no specific showing had been made of prejudice caused by the denial of the motion for continuance. A. 15; 609 S.W. 2d at 776. However, a close reading of the record reveals that the dearth of time available for preparation and investigation had a deleterious effect on the presentation of petitioner's case. The most obvious example is the fact that Connery was unable to provide evidence in support of his motion for severance; because of Connery's lack of familiarity with the case, he was unable to apprise the trial court of the allegedly inconsistent defenses of Sanne and Skillern. A. 14-15; 609 S.W.2d at 775-76. Further, as noted in Judge Phillips' dissent below (joined by Judge Roberts), petitioner's attorney did not have sufficient time to read the transcript of the prior trial and to interview the witnesses, some 50 in number, all of whom resided in some other town. A. 18-20; 609 S.W.2d at 779-81. Judge Phillips also pointed out that while the trial court was saying that counsel can be ready by reading the prior transcript, the State called "critical witnesses" not called at the prior trial.

A. 19; 609 S.W.2d at 780. There are many other similar mistakes made by counsel due to the lack of time for preparation and investigation. Counsel did not object immediately when the trial court, in advising prospective juror Ollie Gray, implicitly told him that the petitioner had a prior felony record; accordingly, nothing was preserved for review. A. 9; 609 S.W.2d at 770. Similarly no objection was made to the admission of testimony bearing on the theft of a car, the acquisition of a gun which was later identified as the murder weapon, and of other drug transactions in which Skillern was implicated. A. 10-11; 609 S.W.2d at 771-72.

The above-mentioned facts clearly show that the denial of the motion for a continuance irreparably harmed the petitioner's defense. In discussing the countervailing interests in an adequate defense and a speedy trial, this Court has said:

> It is true that great and inexcusable delay in the enforcement of our criminal law is one of the grave evils of our time. Continuances are frequently granted for unnecessarily long periods of time, and delays ... have come in many cases to be a distinct reproach to the administration of justice. The prompt disposition of criminal cases is to be commended and encouraged. But in reaching that result a defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense. To do that is not to proceed promptly in the calm spirit of regulated justice but to go forward with the haste of the mob.

Powell v. Alabama, supra, 287 U.S. at 59. In cases such as this where the death penalty may be imposed, the need for "regulated justice" in place of the mob is especially compelling. Skillern was "hurried to trial," id. at 58, without sufficient time to prepare an adequate defense, and as a result was denied his constitutionally guaranteed right to the effective assistance of counsel.

C. Denial of Motion for Appointment of Co-Counsel

The trial court also denied petitioner's motion for the appointment of Tinker as co-counsel. Such motions, like motions for continuances, are usually within the province of judicial discretion. However, similar standards should apply where there has been an abuse of discretion. In this case, the continued appointment of Tinker, who was familiar with the facts and legal issues in this case, as co-counsel would have ameliorated the harm done by the denial of the motion for a continuance.

In United States v. Santos, 588 F.2d 1300, 1304 (9th Cir. 1979), cert. denied, 441 U.S. 906 (1979), the court found that the denial of a continuance to substitute counsel for time to prepare for trial was, in part, remedied by the fact that he was able to consult with other defense counsel after he was appointed. Furthermore, another factor mentioned in Gandy, supra, 569 F.2d at 1324, was whether the lead counsel had an associate who was adequately prepared to try the case. Clearly, collaboration with one who is familiar with the case and prepared for trial will avoid at least some of the dangers of insufficient time for preparation. Therefore, by denying the motion for appointment of co-counsel as well as the motion for a continuance, the trial judge abused his discretion and deprived petitioner of his right to effective counsel.

D. Conclusion

This case, in which the trial judge denied petitioner's motion for continuance, and, in the alternative, for the appointment of an attorney familiar with the case as co-counsel because the same trial judge had removed that attorney and substituted new counsel only three weeks before trial, presents a strong claim of the denial of the effective assistance of counsel guaranteed by the Sixth, Eighth and Fourteenth Amendments to the Constitution. The Texas Court of Criminal Appeals, by rejecting petitioner's appeal on this ground, has placed itself in conflict with numerous decisions of the courts of appeals which demand far greater solicitude for the right of defendants to effective representation. Especially with petitioner's life at stake, this Court should grant certiorari to resolve that conflict.

II.

ADMISSION OF THE PATHOLOGIST'S TESTIMONY ON THE QUESTION OF FUTURE DANGEROUSNESS SEVERELY UNDERMINED THE FAIRNESS AND RELIABILITY OF THE FACT FINDING PROCESS AT THE PENALTY PHASE AND THEREBY VIOLATED PETITIONER'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS

The trial court admitted the testimony of Dr. Joseph C. Rupp, a practicing forensic pathologist, in the punishment phase of the trial on the question of whether there was a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. The Texas Court of Criminal Appeals conceded that the trial court could not properly have found that Dr. Rupp had such skill, knowledge, or experience of human behavior that this opinion was likely to aid the jury in determining the question of petitioner's [illegible] future dangerousness. A. 12-13; 609 S.W.2d 771-74. The court also found that the record did not demonstrate

sufficient firsthand knowledge of petitioner's personal history to qualify Rupp to express a lay opinion, ibid. Nonetheless, the court found that although the trial court had erred in admitting the testimony, that error was harmless because the evidence was not less persuasive without Dr. Rupp's testimony. A. 13; 609 S.W.2d at 774.

A. Error in Capital Punishment Cases

This Court has long held that in cases where the death penalty has been imposed, doubts regarding the prejudicial effect of trial error should be resolved in favor of the accused. Andres v. United States, 333 U.S. 740, 752 (1948). More recently, this Court has given this view additional force from the constitutional recognition that:

> the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from that of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Woodson v. North Carolina, 428 U.S. 280, 305 (1978)(plurality opinion)(footnote omitted). See also, e.g., Lockett v. Ohio, 438 U.S. 586, 604 (1978)(plurality opinion); Beck v. Alabama, 447 U.S. 625, 637-38 & n. 13 (1980). It is only by a scrupulous observance of procedural regularity that the requisite degree of reliability in capital punishment cases can be assured.

This point reinforces the traditional view that courts should be "exceeding slow to disregard error as harmless . . . in a capital case," People v. Rosario, 173 N.E.2d 881, 884 (N.Y. 1961), cert. denied, 368 U.S. 866 (1961), and that they should "attach increased importance to . . . errors" which occur in any case in which

"the extreme penalty [has] . . . been imposed." People v. Crump, 125 N.E.2d 615, 625 (Ill. 1955).

Thus "[w]hat may be harmless error in a case with less at stake becomes reversible error when the penalty is death." Irving v. State, 361 So. 2d 1360, 1363 (Miss. 1978), cert. denied, 441 U.S. 913 (1979). Accord, Pait v. State, 112 So. 2d 380, 385 (Fla. 1959). Because death is different from all other penalties, errors occurring during a capital trial are subjected to the most exacting scrutiny. See Gardner v. Florida, 430 U.S. 349 (1977).

But there are additional reasons for judicial reluctance to disregard as harmless any error committed during the penalty phase of a capital case. To the extent that any such error creates "a substantial risk that [the death penalty will] . . . be inflicted in an arbitrary and capricious manner," Gregg v. Georgia, 428 U.S. 153, 188 (1976)(plurality opinion), it arises to constitutional proportions, and triggers the familiar requirements that a reviewing court must satisfy itself beyond a reasonable doubt that the error was harmless, Chapman v. California, 386 U.S. 18 (1967).

It is particularly difficult to quell reasonable doubt that an error potentially affecting the choice of sentence may in fact have influenced a jury to return a verdict of death, since the range of evidence which the jury may consider at the penalty phase of a capital trial is uniquely broad, and the jury has unique latitude in deciding whether or not "the circumstances of the offense together with the character and propensities of the offender" justify the imposition of the death penalty, Gregg v. Georgia, supra, 428 U.S. at 189. In this context, one court has commented:

> the jury may conceivably rest the death penalty upon any piece of . . . data or any one factor in [the] welter of matter [which may be introduced at the penalty phase]. The precise point which prompts the penalty in the mind of any one juror is not known to us and may not even be known to him. Yet dark ignorance must be compounded twelve times and deepened even further by the recognition that any particular factor may influence any two jurors in precisely the opposite manner.
>
> We cannot determine if other evidence before the jury would neutralize the impact of an error and uphold a verdict. Such factors as the grotesque nature of the crime, the certainty of guilt, or the arrogant behavior of the defendant may conceivably have assured the death penalty despite any error. Yet who can say that these very factors might not have demonstrated to a particular juror that a defendant, although legally sane, acted under the demands of some inner compulsion and should not die? We are unable to ascertain whether an error which is not purely insubstantial would cause a different result; we lack the criteria for objective judgment.
>
> Thus any such substantial error in the penalty trial may have affected the result; it is "reasonably probable" that in the absence of such error "a result more favorable to the appealing party would have been reached."

People v. Hines, 390 P.2d 398, 402 (Cal. 1964). See also People v. Hamilton, 383 P.2d 412, 431 (Cal. 1963); People v. White, 446 P.2d 993, 999 (Cal. 1968). The difficulty of determining the motivations for jury decisions in the penalty phase of a capital trial necessitates scrupulous adherence to procedural due process requirements.

B. Error in the Penalty Phase under the Texas Statute

The dangers apparent in attempting to discern whether an error has influenced any jury members are particularly acute under the Texas capital punishment statute. According to the Texas statute, Tex. Code. Crim. Pro. Art. 37.071, the jury must unanimously agree that each of the three special issues, including the question of defendant's future dangerousness, have been proven beyond a reasonable

doubt. Clearly, where an error in admission of evidence has been made, it is almost impossible to be sure beyond a reasonable doubt that without that piece of evidence not even one juror would have entertained some doubt on any of the special issues.

These dangers are even more striking where the error lays in the admission of testimony on the question of future dangerousness by an individual who is purported to be an expert. Expert testimony may be given great weight by jurors who have little personal knowledge of the likelihood that any particular criminal would pose a future danger to society. It is possible that some jurors may mistakenly rely on the expert's testimony in place of their own judgment because of an earnest desire to place the burden of imposing the death sentence on another person.2/ Because of the strong possibility of reliance on allegedly expert testimony as well as the substantial interest in carefully scrutinizing error in capital cases to ascertain that it is harmless beyond any reasonable doubt, the error in this case should be found to have deprived the petitioner of the fairness and reliability in capital sentencing guaranteed by the Eighth and Fourteenth Amendments. It is impossible to be certain beyond a reasonable doubt that the testimony of Dr. Rupp on the petitioner's future dangerousness did not influence a single juror in his vote on that issue.

2/ Scofield, Due Process in the United States Supreme Court and the Death of the Texas Capital Murder Statute, 8 Am. J. Crim. L. 1, 40 (March 1980).

III.

ADMISSION OF AN INDICTMENT WHERE THE FINAL CONVICTION FOR A LESSER OFFENSE WAS AVAILABLE SEVERELY UNDERMINED THE FAIRNESS AND RELIABILITY OF THE FACT FINDING PROCESS AT THE PENALTY PHASE AND THEREBY VIOLATED PETITIONER'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS

In the penalty phase of the trial, where admission of prior criminal offenses is permitted, the trial court admitted into evidence the indictment for murder with malice of petitioner's brother even though petitioner had been convicted of murder without malice in that case. The Texas Court of Criminal Appeals upheld the admission of the indictment into evidence. A. 12; 609 S.W.2d at 773.

Under Tex. Code. Crim. Proc. Art. 37.071(3)(a), the evidence of a prior criminal record which is permitted after a finding of guilt is limited to a final conviction in a court of record, or a probated or suspended sentence that has occurred prior to trial, or any final conviction material to the offense charged. However, Texas courts do permit pleadings, indictments, complaints, and informations as evidence to prove the prior criminal record. Knox v. State, 487 S.W.2d 322, 326 (1972). Furthermore, under the procedure for the penalty phase of a capital trial, the court is given discretion to admit all relevant evidence. Tex. Code Crim. Pro. Art. 37.071(a). However, Texas cases permitting testimony about prior criminal conduct other than prior final convictions have only admitted evidence of unadjudicated crimes. Garcia v. State, 581 S.W.2d 168 (1979); Quinones v. State, 592 S.W.2d 933, 945 (1980); Milton v. State, 599 S.W.2d 824 (1980). No case has held that in the penalty phase of a death penalty case an indictment alleging a greater offense than the final conviction is admissible.

The central question is whether evidence of an indictment for a prior criminal offense is relevant where the final conviction for a lesser offense is available. In Jurek v. Texas, 428 U.S. 262, 276 (1976), this Court said that "[w]hat is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine." But the central constitutional concern has been to make sure that all possible mitigating factors are admitted because of the Eighth Amendment prohibition of cruel and unusual punishment. In Lockett v. Ohio, 438 U.S. 586, 608 (1977), the Court found the Ohio capital punishment statute unconstitutional because of the limited range of mitigating circumstances that could be considered. The Court stressed the need for individualized consideration of capital cases:

> Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases. The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases. A variety of flexible techniques -- probation, parole, work furloughs, to name a few -- and various postconviction remedies may be available to modify an initial sentence of confinement in noncapital cases. The nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence.

Id. at 605. The Chief Justice, writing for the plurality, explained the decision in Jurek as upholding the Texas statute "because three judges concluded that the Texas Court of Criminal Appeals had broadly interpreted the second question . . . so as to permit the sentencer to consider 'whatever mitigating circumstances' the defendant might be able to show." Id. at 607.

Clearly, the constitutional support for admission of all possible mitigating factors does not extend to the admission of aggravating factors. Indeed, because of the nature of the Eighth and Fourteenth Amendment rights at stake in the imposition of the death penalty, there is a special need for careful scrutiny of evidence admitted to support the imposition of the death penalty. Woodson v. North Carolina, supra, 428 U.S. 280, 305 (1976)(plurality opinion).

In this case, the trial court admitted an indictment, which is only an allegation, where the final conviction, which is the jury's determination of truth, was available. In this context, there is obviously no substantial interest in imposing the death penalty based on mere allegations. Where the final conviction is available, the indictment -- being only an allegation -- is simply not relevant to the question of whether the defendant presents a future danger to society. Admission of the indictment in this case deprived petitioner of the reliability in capital sentencing guaranteed by the Eighth and Fourteenth Amendments. As was discussed in the previous section, the application of the harmless error doctrine is not appropriate for errors made in the admission of aggravating evidence in the penalty phase of a capital punishment trial.

IV.

DEATH IS A DISPROPORTIONATELY SEVERE AND UNCONSTITUTIONAL SENTENCE FOR ONE WHO HAS NOT TAKEN LIFE, ATTEMPTED TO TAKE LIFE, OR INTENDED TO TAKE LIFE

At the second trial, Sanne admitted killing Randel; thus it is undisputed that Skillern did not personally commit the act of murder. Furthermore, there is no evidence placing Skillern at the scene of the murder nor is there any evidence that Skillern intended that Randel be murdered. Therefore, petitioner's sentence raises the question of whether the imposition of the death penalty in a case of this kind is "so disproportionate in comparison to the nature of the defendant's . . . involvement in the capital offense as independently to violate the Eighth and Fourteenth Amendments." Woodson v. North Carolina, supra, 428 U.S. at 305 n. 40 (plurality opinion).

It is a settled Eighth Amendment principle that "punishment for crime should be graduated and proportioned to offense." Weems v. United States, 217 U.S. 349, 366-67 (1910). This Court has held that a punishment is unconstitutional where it "(1) makes no reasonable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime. A punishment might fail the test on either ground." Coker v. Georgia, 433 U.S. 584, 592 (1977). While the Court has concluded that "the death penalty for deliberate murder [is] neither the purposeless imposition of severe punishment nor a punishment grossly disproportionate to the crime," ibid.,

it held in Coker that the death penalty was disproportionate and therefore unconstitutionally excessive for the non-homicidal crime of rape.

Petitioner's death sentence does not and cannot rest upon a finding that he deliberately committed a murder. At most it rests upon a finding that petitioner was a participant in a non-homicidal crime. His participation in that crime has been made the basis for a death sentence exclusively through the operation of vicarious-liability/felony-murder doctrines that permitted him to be convicted of murder despite the absence of any intent to kill or action of his directed to the killing. Nothing else in this record sustains the death penalty.

The history of the actual use of the death penalty in the recent past confirms without question that the combined effect of the exercise of jury discretion and the discretion of executive and prosecuting officials has been the de facto abolition of the death penalty for non-triggermen in felony-murder situations. A search for all reported appellate opinions in post-1954 cases submitted to the Court in Lockett v. Ohio, supra, reveals only six cases out of 363 where clearly identifiable felony-murder non-triggermen were executed. The last such execution took place in 1955, twenty-six years ago. By comparison, there have been 72 executions for rape in this country since 1955. See Lockett v. Ohio, supra, 438 U.S. at 624-25 (concurring opinion of Justice White). Thus, it is apparent that executions for homicides not clearly committed by the person executed have been a good deal less prevalent in this country than the practice declared

unconstitutional in Coker v. Georgia, supra. Looking as this Court did in Coker to "guidance in history and from the objective evidence of the country's present judgment," id. at 593, one finds that the death penalty for non-triggermen is virtually extinct.

The behavior of juries and public officials in non-triggerman cases is indicative that there does not exist with regard to these cases such "moral outrage," Gregg v. Georgia, supra, 428 U.S. at 183 (plurality opinion), that "the only adequate response may be the penalty of death," id. at 184. And, whatever assumptions may be made regarding the deterrent effect of the death penalty for "carefully contemplated murders," id. at 186, or in categories of cases for which "other sanctions may not be adequate," ibid., it is simply common sense that the use of the death penalty against a non-triggerman who does not commit, attempt, or intend a killing will not reduce the incidence of murder. Thus, the execution of petitioner and of similarly situated murderers-by-legal-fiction would "be so totally without penological justification that it results in the gratuitous infliction of suffering." Id. at 183.

This issue was raised in Lockett v. Ohio, supra, 428 U.S. at 609 n. 16, but the plurality did not address it. However, Justice White based his concurring opinion on the view that it violates the Eighth Amendment to impose the penalty of death without a finding that the defendant possesed a purpose to cause the death of the victim. Id. at 624. Justice White said:

> The value of capital punishment as a deterrent to those lacking a purpose to kill is extremely attenuated. Whatever questions may be raised concerning the efficacy of the death penalty as a deterrent to intentional murders . . . its function in deterring individuals from becoming involved in ventures in which death may unintentionally result is even more doubtful. Moreover, whatever legitimate purposes the imposition of death upon those who do not intend to cause death might serve if inflicted with any regularity is surely dissipated by society's apparent unwillingness to impose it upon other than an occasional and erratic basis.

Id. at 625. Justice Rehnquist and Justice Blackmun were troubled by Justice White's insistence on a requirement of culpable intent for infliction of the death penalty. Id. at 635 (Rehnquist, J. dissenting); id. at 614 (Blackmun, J. concurring). But Justice Blackmun explained his unease by his doubts that, "the Court, in regard to murder, could easily define a convincing bright-line rule such as was used in regard to rape to make workable a disproportionality approach." Id. at 614 (Blackmun, J. concurring)(footnote omitted).

However, the question arises in this case not only because Skillern did not intend the killing, but also because he did not perform any act directed to the killing -- or at least the record is silent in that regard. There is little problem in drawing the line between triggermen and non-triggermen in felony-murder situations where the non-triggermen has not planned the killing. As Judge Phillips noted in his dissenting opinion below, "[a]t trial it was undisputed that Sanne not Skillern shot the deceased." A. 17; 609 S.W.2d at 778.

The strongest evidence before the trier of fact concerning petitioner's participation in the crime itself was his leaving in a separate car in the same direction that the deceased and Sanne went, his arrest the following

morning in possession of the deceased's pistol, perhaps the ring and the "buy" money from the motel room where the deceased had stayed, and the similarity between a pistol found on the side of a road some thirty miles distance from the scene of the shooting and one possessed by petitioner some months before the shooting.

There is an absolute absence of any affirmative evidence showing petitioner intended the death or participated in it.

Therefore, because petitioner did not personally commit the murder nor plan it, this Court should grant certiorari to determine whether the death sentence should be found disproportionately severe and unconstitutional under the Eighth Amendment.

CONCLUSION

For the foregoing reasons, the Writ of Certiorari should be granted.

Respectfully submitted,

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ATTORNEY FOR PETITIONER

APPENDIX A

three considerations in the property division: James' conduct, the disparity of earning power of the spouses, and the rights of the parties' adult disabled son.

The second reason given by the court of civil appeals in concluding that fault should not be considered is that fault does not ever lie totally with one spouse, and that consideration of fault would "require a trial judge to assess each and every bicker, nag and pout, as well as greater faults, of each spouse." 594 S.W.2d at 545. Again, we do not agree. We are not here concerned just with bickers, nags and pouts. Here, we have unchallenged findings of cruelty, adultery, and desertion. Both the Legislature and the courts have traditionally considered these to be "fault." In this situation, we agree with the trial court that fault may be a consideration to be weighed in the division of property. This does not mean that fault *must* be considered in all cases where a divorce is granted on fault grounds. Our holding is that it may be considered.

[5] In considering fault, along with other factors, the trial court is directed by section 3.63 to make a property division which is "just and fair." The division should not be a punishment for the spouse at fault. That would be an abuse of the trial court's discretion. There is a difference between making a just and right division of the property with due regard for the children of the marriage, as approved in *Hedtke* almost sixty years ago, and punishing the errant spouse. In general, the trial courts in Texas have perceived this distinction. The trial court has broad discretion in determining the disposition of property in divorce actions and this discretion will not be disturbed unless an abuse of discretion is shown. *McKnight v. McKnight*, 543 S.W.2d at 866; *Cockerham v. Cockerham*, 527 S.W.2d 162, 173 (Tex.1975); *Bell v. Bell*, 513 S.W.2d 20, 22 (Tex.1974). Considering the record before us, we are unable to say that the trial court abused its discretion.

[6] In his brief in the court of civil appeals, James complains that there was no evidence to support the award of attorney's fees to Laura. The court of civil appeals did not rule on this point. James filed no motion for rehearing in the court of civil appeals and no brief in this Court. He attempted to raise the point on oral argument.

Neither party complained of the action, or inaction, of the court of civil appeals, and neither party has a point or cross-point in this Court on attorney's fees. While we may look to points in the court of civil appeals upon which to affirm that court's judgment, the judgment of that court was that of reversal and remand. The attorney's fees point was a "no evidence" point; and, if sustained and severed, it would have resulted in a reversal and rendition. We may not, therefore, use that point here. Since the attorney's fees question has not been preserved to this Court, we have no jurisdiction to decide it.

The judgment of the court of civil appeals is reversed and the judgment of the trial court is affirmed.

Charles Victor SANNE and Doyle Edward Skillern, Appellant,

v.

The STATE of Texas, Appellee.

Nos. 63254, 63255.

Court of Criminal Appeals of Texas, En Banc.

Sept. 10, 1980.

Rehearing Denied Nov. 5, 1980 for No. 63254.

Rehearing Denied Dec. 10, 1980 for No. 63255.

Following remand, 559 S.W.2d 828, defendants were convicted in the 36th Judicial

parties in a divorce action. *Haggard v. Haggard*, 550 S.W.2d 374, 378 (Tex.Civ.App.-Dallas 1977, no writ); *Waggener v. Waggener*, 460 S.W.2d 251, 254 (Tex.Civ.App.-Dallas 1970, no writ).

District Court, Aransas County, John H. Miller, J., of capital murder, and they appealed. The Court of Criminal Appeals, Odom, J., held that: (1) defendant, who received favorable answer to second punishment issue in first capital murder trial, should not have been subjected to risk of receiving penalty of death upon retrial following reversal of first conviction; but (2) it was proper to sustain State's challenge for cause to venireman who stated he could vote for death penalty only if victim were very close friend; (3) probable cause to stop and detain occupants of automobile arose when officers learned that the automobile was stolen; (4) arrest of defendants was authorized when defendant, who pointed to his belt when asked whether he was carrying weapon, was found in possession of pistol; (5) evidence offered by State in punishment phase did not exceed scope of admissible prior criminal record evidence; (6) evidence presented at punishment phase, together with evidence presented at guilt phase, was sufficient to support verdict on second punishment issue as to second defendant; (7) neither defendant was entitled to severance; (8) absent showing of how defendant was prejudiced by fact that counsel had only 22 days to prepare defense following appointment, it was not abuse of discretion for trial court to overrule defendant's motion for continuance; and (9) neither defendant was entitled to appointment of additional counsel.

As reformed to punishment by confinement for life, judgment as to one defendant's appeal is affirmed; judgment as to other defendant affirmed.

Phillips, J., dissented and filed opinion in which Roberts, J., joined.

1. Criminal Law ⇐193

Defendant, who received favorable answer to second punishment issue in first capital murder trial should not have been subjected to risk of receiving penalty of death upon retrial following reversal of first conviction. Vernon's Ann.C.C.P. art. 37.071.

2. Constitutional Law ⇐250.2(4), 267

Prejudicial harm was not shown to have occurred from alleged violation of equal protection and due process rights of defendant resulting from requirement that defendant in capital case exercise peremptory challenges upon examination of individual prospective jurors and that defendant not make peremptory challenges after examination of entire venire where defendant did not establish that he would have exercised his peremptory challenges differently had he been permitted to do so. Vernon's Ann.C.C.P. art. 35.13; U.S.C.A.Const. Amend. 14.

3. Jury ⇐108

In capital murder prosecution, it was proper to sustain state's challenge for cause to venireman who stated he could vote for death penalty only if victim were very close friend. Vernon's Ann.C.C.P. art. 35.16.

4. Jury ⇐149

It was not error to refuse to grant motion for mistrial sought after trial court excused accepted and sworn juror for illness before jury was completed where it had become apparent that the juror would be unable to serve. Vernon's Ann.C.C.P. arts. 35.16, 35.19.

5. Criminal Law ⇐172

A "jury" had not been impaneled when accepted and sworn juror was excused for illness where the juror was excused before selection of jury was completed, and thus jeopardy had not attached before the juror was excused, and defendant was not twice placed in jeopardy. Vernon's Ann.C.C.P. arts. 35.16, 35.19; U.S.C.A.Const. Amend. 5.

6. Jury ⇐40

It was proper for trial court to excuse, sua sponte, venireman upon discovering defect in venireman's hearing. Vernon's Ann. C.C.P. arts. 35.16(a)(4), 35.19.

7. Jury ⇐83(1)

It was not error to overrule defendant's challenges for cause to three prospective jurors absent showing by defendant how he was harmed by impanelling the jurors.

8. Jury ⇐131(15)

No abuse of discretion occurred in limiting defendant's cross-examination of venireperson where the venireperson stated she could render impartial verdict and proposed questions were cumulative of those already asked and answered.

9. Jury ⇐131(4)

Record failed to establish error in connection with alleged action of trial court in implicitly advising prospective juror that defendant may have had prior felony record.

10. Jury ⇐110(12)

No error occurred in denying defendant's challenge for cause to venireman where defendant had expressly accepted the juror and codefendant exercised peremptory challenge against the juror.

11. Arrest ⇐63.5(6)

Probable cause to stop and detain occupants of automobile arose when officers learned that the automobile was stolen. U.S.C.A.Const. Amend. 4.

12. Arrest ⇐63.4(16)

Arrest of defendants, who were lawfully stopped after officers learned that automobile defendants were using was stolen, was authorized when defendant, who pointed to his belt when asked whether he was carrying weapon, was found in possession of pistol. U.S.C.A.Const. Amend. 4.

13. Criminal Law ⇐394.5(2)

Defendant lacked standing to challenge admission of gun, ring, and money taken from codefendant following their arrest and search. U.S.C.A.Const. Amend. 4.

14. Criminal Law ⇐1169.3

Codefendant's admission that he shot victim with .38 revolver obtained from particular third person rendered harmless any error committed in admitting testimony of state's ballistics expert, who was unable to express opinion respecting particular .38 revolver introduced into evidence.

15. Criminal Law ⇐1169.2(2)

Any complaint as to admission of testimony that automobile in which defendants were apprehended was stolen from witness' home was waived where other testimony that the automobile was reported stolen had been given without objection.

16. Criminal Law ⇐1036.1(1)

Failure to object at trial to testimony waived claimed error.

17. Criminal Law ⇐369.3

Testimony that certain phone number at address in specific city was registered to specific party did not, either expressly or by implication, show offense extraneous to charged capital murder, and thus it was not improper to admit such testimony.

18. Criminal Law ⇐1130(2)

Ground of error challenging admission of 16 different exhibits offered by state on basis that admission of such exhibits had "cumulative" prejudicial effect was multifarious and presented nothing for review. Vernon's Ann.C.C.P. art. 40.09, subd. 9.

19. Criminal Law ⇐696(6)

Defendant was not entitled to have police officer's testimony concerning defendant's reputation for truth and veracity stricken where objection was not urged at earliest opportunity, and cross-examination and voir dire of the officer revealed basis for his testimony sufficient to qualify him.

20. Criminal Law ⇐381

Any objection based on remoteness of time at which witness became acquainted with defendant's reputation would go to weight, not admissibility, of reputation testimony.

21. Indictment and Information ⇐137(1)

It was not error to overrule defendant's motion to quash indictment and his special plea in bar challenging statute governing second punishment issue in capital murder prosecutions on basis that it failed to afford jury channeled and defined guidance and instruction as to what conduct or other factors may be appropriately considered by them in determining whether defendant would probably commit criminal act of violence constituting continuing threat to society. Vernon's Ann.C.C.P. art. 37.071.

22. Homicide ⇐354

In capital murder prosecution, it was not error to admit during punishment phase indictment alleging murder with malice, even though conviction was for murder without malice. Vernon's Ann.C.C.P. arts. 37.07, § 3(a), 37.071(a).

23. Homicide ⇐354

In capital murder prosecution, evidence as to defendant's joking conversations about having buried brother under concrete patio and that defendant should have killed brother's wife instead of brother because she was uglier of the two, and evidence as to abortive burglary plan, did not exceed scope of prior criminal record admissible in punishment phase. Vernon's Ann.C.C.P. arts. 37.07, § 3(a), 37.071(a).

24. Homicide ⇐354

Trial court has wide discretion in admitting or excluding evidence at punishment phase of capital murder trial. Vernon's Ann.C.C.P. arts. 37.07, § 3(a), 37.071(a).

25. Criminal Law ⇐479

It was error to allow forensic pathologist to express his opinion as to second punishment issue in capital murder prosecution where trial court could not properly have found that the pathologist had such skill, knowledge or experience about human behavior that it was probable his opinion would be of assistance to jury in making factual determination whether there was probability that defendant would commit criminal acts of violence and be continuing threat to society in future, and record did not reflect that the pathologist had sufficient firsthand familiarity with defendant's personal history to qualify him to express lay witness opinion that defendant would be continuing threat to society. Vernon's Ann.C.C.P. art. 37.071.

26. Homicide ⇐354

Error in allowing forensic pathologist to express opinion as to second punishment issue in capital murder prosecution was harmless where evidence abundantly demonstrated that defendant had antisocial personality, and record established that minds of average jury would not have found State's case less persuasive had the pathologist's opinion testimony not been admitted. Vernon's Ann.C.C.P. art. 37.071.

27. Homicide ⇐354

In capital murder prosecution, evidence presented at punishment phase, together with evidence presented at guilt phase, was sufficient to support verdict on second punishment issue. Vernon's Ann.C.C.P. art. 37.071.

28. Homicide ⇐354

Law of parties applies to punishment issues in capital murder case, and thus fact that codefendant did the shooting did not prevent evidence from being sufficient to support submission of first and third punishment issues. Vernon's Ann.C.C.P. art. 37.071.

29. Criminal Law ⇐622(2)

It was not abuse of discretion to refuse to grant defendant's pretrial motion for severance sought on basis that codefendant had prior felony convictions admissible against codefendant where defendant also had prior conviction that was admissible at trial, and defendant failed to establish how he would be prejudiced by joint trial with codefendant. Vernon's Ann.C.C.P. arts. 36.09, 37.07, § 3(a), 37.071, 38.29, 40.09, subd. 9.

30. Criminal Law ⇐622(4)

It was not timely to urge motion for severance at end of guilt stage of capital murder prosecution and before evidence on punishment phase was heard. Vernon's Ann.C.C.P. arts. 36.09, 40.09, subd. 9.

31. Criminal Law ⇐622(2)

It was not error to deny a motion to sever sought on basis that codefendants would raise inconsistent defenses where there was no showing that trial court was apprised of the allegedly inconsistent defenses and there was no support in record for such aspect of the motion. Vernon's Ann.C.C.P. arts. 36.09, 40.09, subd. 9.

32. Criminal Law ⇐590(2)

Absent showing of how defendant was prejudiced by fact that counsel had only 22 days to prepare defense following appointment, it was not abuse of discretion for trial court to overrule defendant's motion for continuance.

33. Criminal Law ⇐641.5

The "category of cases" principle did not entitle defendant to appointment of additional counsel in capital murder prosecution, since there is no mandatory provision for appointment of additional counsel in capital cases.

34. Criminal Law ⇐641.5

In capital murder prosecution, it was not abuse of discretion to refuse to appoint additional defense counsel where defendant failed to show harm arising from such failure.

35. Indictment and Information ⇐87(3)

Allegation in indictment that offense was committed "anterior to the presentment of this indictment" was sufficient to meet requirement that indictment disclose affirmatively that it was presented subsequent to date of alleged offense. Vernon's Ann.C.C.P. art. 21.02, subd. 6.

36. Criminal Law ⇐641.12(1)
Witnesses ⇐266

Record failed to establish that defendant was denied right of cross-examination and right to effective assistance of counsel on numerous occasions throughout capital murder trial when trial court allegedly assumed role of prosecution.

Allen C. Lee, Rockport, for Sanne.

David B. Connery, Jr., Houston, for Skillern.

William L. Hardwick, County Atty., George West, Thomas L. Bridges, Dist. Atty., Sinton, Charles D. Butts, Sp. Pros. Atty., San Antonio, Robert Huttash, State's Atty., Austin, for the State.

Before the court en banc.

OPINION

ODOM, Judge.

These are appeals from convictions for capital murder. Appellants were charged as parties to the offense and were tried together a second time after the first conviction was reversed by this Court. *Skillern v. State*, 559 S.W.2d 828. Punishment was assessed at death in each case after the jury returned affirmative answers to the punishment issues submitted under Article 37.071, V.A.C.C.P.

Eighteen grounds of error have been raised by Sanne and twenty-three by Skillern. For convenience, we will group together for discussion those grounds from the two briefs which touch upon similar points of law.

The sufficiency of the evidence to convict has not been challenged by either appellant. The facts forming the basis of this prosecution are summarized in the opinion on the appeal of the first conviction. *Skillern v. State*, supra. In addition, Sanne took the stand in his own behalf at the second trial and admitted shooting the deceased, but claimed he acted in self-defense.

SANNE'S JEOPARDY ISSUE

[1] In his first and second grounds of error Sanne urges that the trial court committed reversible error in refusing to grant his pretrial motion of former jeopardy and in refusing to instruct the jury to answer "No" to the second punishment issue under Art. 37.071, V.A.C.C.P. He bases his argument on the jury's finding in his first trial that he would not commit criminal acts of violence that would constitute a continuing threat to society, and the consequent assessment of life imprisonment. As a result of the first jury's decision, Sanne contends, he should not have been forced to run the risk of being assessed the death penalty in his second trial.

Recently, in *Brasfield v. State*, 600 S.W.2d 288, this Court held that the principle of *Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978), and *Greene v. Massey*, 437 U.S. 19, 98 S.Ct. 2151, 57

L.Ed.2d 15 (1978) applies to the appellate court's reversal of a death penalty on the basis of insufficient evidence to sustain the jury's affirmative answer to the second punishment issue. Accordingly, it was held that the State could not again seek the death penalty against the defendant. The defendant, therefore, was accorded the protection upon retrial which accrued to him when the appellate court found as a matter of law that life imprisonment was the only verdict permissible under the evidence. A fortiori, when, as in the case at bar, the defendant has in fact received a favorable verdict on the issue of future dangerousness in his first trial, he should be entitled to the same protection against having his life placed in jeopardy a second time. We hold, then, that having received a favorable answer to the second punishment issue in his first trial, appellant Sanne should not have been subjected to the risk of receiving the penalty of death upon his retrial following reversal of his first conviction, and that his punishment must be reformed from death to life. This holding, however, affects only the punishment stage, and does not affect the jury's determination of appellant's guilt of the crime charged. We therefore must consider the other grounds of error addressed to the guilt stage of appellant Sanne's trial.[1]

JURY SELECTION ISSUES

[2] Skillern's fifth ground of error raises a challenge to the constitutionality of Article 35.13, V.A.C.C.P., which provides in part:

> "A juror in a capital case ... held to be qualified, shall be passed for acceptance or challenge first to the state and then to the defendant. Challenges to jurors are either peremptory or for cause."

The claim is made that it violates the equal protection and due process clauses of the state and federal constitutions to require the defendant in a capital case to exercise peremptory challenges upon the examination of individual prospective jurors, and to deny him the right of the defendant in a non-capital felony case to make a sensible and circumspect exercise of his peremptory challenges after examination of the entire venire.

Assuming, without deciding, that this constitutional challenge is not without merit, we are constrained to find that harm has not been demonstrated under the facts of this case. The flaw in Skillern's argument is that he has not shown that he would have exercised his peremptory challenges differently, and that a jury he did not want was impaneled as a result of the procedure followed. That such a showing is incumbent upon defense counsel may be extracted from the rules previously enunciated by this Court with respect to determination of harm arising from jury selection errors, discussed in *Payton v. State*, Tex.Cr.App., 572 S.W.2d 677.

We will describe two methods that could have been used to show the harm required to preserve this constitutional challenge for review. On the one hand, a defendant may choose to use a peremptory challenge to exclude a prospective juror while claiming he should have the right to reserve the strike until after the entire venire has been questioned. In such a case, harm would be shown by use of all peremptory challenges, denial of a request for additional peremptory challenges, and the seating of a juror upon whom the defendant would have exercised peremptory challenge. This rule allows correction of any error by giving the defendant an extra peremptory challenge for use against the venireman the defendant would have stricken if given a choice between him and the venireman against whom a peremptory had already been used.[2]

1. Sanne's fifteenth, sixteenth, seventeenth, and eighteenth grounds of error raise various contentions pertaining to the punishment phase of this prosecution. Since the judgment is to be reformed to reflect a sentence of life imprisonment, thus giving Sanne the most favorable verdict possible in this type of case, none of these grounds need be discussed. *Phelps v. State*, Tex.Cr.App., 594 S.W.2d 434; *Marini v. State*, Tex.Cr.App., 593 S.W.2d 709.

2. The similarity between this rule and that applicable in the case of an improper denial of a challenge for cause should be apparent. See

In the case at bar the record reflects two occasions on which Skillern exercised peremptory challenges while claiming the right to reserve them. He did not, however, show a request for additional peremptory strikes after exhaustion of his peremptory challenges, the next vital step in demonstrating harm. No error has been shown from this standpoint.

On the other hand, a defendant may, as Skillern did with respect to two veniremen, join the issue by *declining to use* a peremptory challenge to exclude a prospective juror while claiming he should have the right to reserve the strike. In such a situation, the defendant must show that at the end of examining the venire, he made a retroactive request to exercise his peremptory challenges in the manner to which he claims he is entitled. In this way, the trial court is accorded the opportunity to nullify any error stemming from adherence to the complained of procedure. In the case at bar, the record fails to reflect that Skillern made such a request. Accordingly, we do not reach the merits of this ground of error. The fifth ground of error is overruled.

[3] Skillern's ninth ground of error asserts the trial court erroneously sustained the State's challenge for cause to venireman Frank Garza. He claims that Garza was excused in violation of the doctrine of *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968).[3] Specifically, appellant argues that Garza should not have been excused because it was brought out that he could vote for the death penalty in a case where a very close friend was the victim. Prior to this testimony, the prosecutor had elicited the following from Garza:

"... Now, do you have any conscientious scruples against voting for or giving the death penalty as a punishment for crime in the proper case?

"A. Yes, sir.

"Q. You do have?

"A. I'm against capital punishment.

"Q. I see. Now, when you say, 'against capital punishment,' are you telling us that you could not, under any circumstances as a juror, vote for a verdict that would result in that being the penalty?

"A. I'd have to vote against it. I just don't believe in capital punishment.

• • • • • •

"Q. Are you telling us that you can think of no circumstances or no fact situation, regardless of how severe were the facts, knowing that that might be the penalty if you voted to find someone guilty, you could not do so because that would be the result?

"A. Yes, I couldn't vote for capital punishment."

In *O'Bryan v. State*, 591 S.W.2d 464, this Court held that a prospective juror who stated that the only circumstance under which he could vote for the death penalty was if the victim was a member of his family was properly excused under *Witherspoon*. The reasoning of that decision is quoted below, because it applies with equal force in the instant case:

"... [I]t is apparent that venireman Bowman could consider capital punishment only if the victim of the crime were a member of his family. In such a circumstance, venireman Bowman would be unable to serve as a juror *because of his interest and prejudice in the case*. Arti-

Payton, supra. There, the extra peremptory challenge compensates for the one used against the venireman who was subject to challenge for cause.

3. The same claim is advanced by Sanne in his fourth ground of error. As to him, however, the contention is moot and need not be discussed. In *Phelps*, supra, this Court stated:

"... *Witherspoon* is inapplicable to a case where the jury votes for a sentence of life imprisonment and there is no evidence that the jury selection process produces a jury that is necessarily 'prosecution prone.' *Bumper v. North Carolina*, 391 U.S. 543 [88 S.Ct. 1788, 20 L.Ed.2d 797] (1968)."

This principle should hold equally true where, as in the present case, life imprisonment is assessed as a matter of law. Sanne's fourth ground of error is overruled.

cle 35.16, Vernon's Ann.C.C.P. The ability to consider capital punishment as a tool of vengeance by a person aggrieved by the loss of a family member is surely not within the contemplation of *Witherspoon*. No other group would be more predisposed to vote for capital punishment than a jury composed of surviving members of the deceased victim's family. The situation in which Bowman could consider the imposition of death as a penalty is the situation which *Witherspoon* proscribes—the imposition of the death penalty by a 'hanging jury.'

"The voir dire of Bowman revealed that he would not vote for capital punishment in a case where he was otherwise qualified to sit as a juror. In those situations, Bowman was resolved to vote against capital punishment, regardless of the evidence produced. He was properly excused under *Witherspoon*." (Emphasis added.)

The only circumstance under which veniremen Garza stated he could vote for the death penalty was if the victim were a very close friend. Just as in *O'Bryan*, where the juror stated he could vote for the death penalty only if the victim was a member of his family, Garza's exception to his opposition to the death penalty would render him unable to serve as a juror because of his interest and prejudice in the case. Article 35.16, V.A.C.C.P. In addition, the ability to consider the capital punishment where a close friendship existed between the venireman and the victim of the crime is a situation sufficient to be outside the contemplation of *Witherspoon*. This ground of error is overruled.

[4] Sanne's seventh ground of error and Skillern's eleventh challenge the trial court's refusal to grant motion for mistrial when the court excused Dorothy Jean Lassiter Turner for illness after she had been accepted and sworn as a juror, but before the jury was completed. It is contended that it was reversible error for the court to complete the selection of the jury, rather than discharge those jurors who had been sworn and begin the selection process anew. We disagree with the appellants' contentions.

It was proper to excuse this juror when it became apparent she would be unable to serve. Under Articles 35.16 and 35.19, V.A.C.C.P., the juror was absolutely disqualified. That the juror had been sworn did not render these provisions inapplicable. Jury selection had not been completed. The trial court acted correctly in selecting a juror to replace the one excused. The rule of *Ellison v. State*, 12 Tex.App. 557, 580 (1882) that

"... [A]fter a juror has been once impaneled in a felony case, it is beyond the power of the court to excuse him from serving in the case, and that in case of sickness or accident rendering it impracticable to proceed with the trial of the case before the jury as then constituted, the court shall discharge that jury and proceed to form another for the trial of the case."

is hereby overruled.

[5] In this same ground of error appellant Sanne urges that he was twice placed in jeopardy when the juror was excused, reasoning that jeopardy attached once the individual juror had been qualified and sworn. Long ago, this Court answered this very contention adversely to Sanne's position. In *Steen v. State*, 242 S.W. 1047 (1922) the Court addressed the merits of a plea of jeopardy which arose when it was discovered that the fifth of six jurors who had been sworn was absolutely disqualified. The trial court discharged all six, and continued the case until the next term. The court wrote:

"No jury, within any construction of that word supported by any authority known to us, was charged with his deliverance. Six men alone were impaneled. They could not render a verdict in a felony case. *The jurors, in the capacity of a jury, were never impaneled.*" (Emphasis added.)

In the present case, as in *Steen*, a "jury" had not been impaneled when the individual juror was excused. A jury had not been impaneled so jeopardy had not attached.

See, *Crist v. Bretz*, 437 U.S. 28, 98 S.Ct. 2156, 57 L.Ed.2d 265. These grounds of error are overruled.

[6] Sanne's eighth ground of error and Skillern's seventh ground of error address the action of the trial court in excusing venireman Willard Clifford Anderson sua sponte upon discovering a defect in hearing and without a challenge for cause from the State. This contention is without merit. In *Valore v. State*, Tex.Cr.App., 545 S.W.2d 477, the Court stated:

> "A trial court should not, sua sponte, excuse prospective jurors for cause unless they are absolutely disqualified. *Pearce v. State*, Tex.Cr.App., 513 S.W.2d 539; *Henricksen v. State*, Tex.Cr.App., 500 S.W.2d 491."

Under Articles 35.16(a)(4) and 35.19, V.A.C.C.P., a defect in hearing rendering a prospective juror unfit for jury service is an absolute disqualification. The trial court acted properly in excusing venireman Anderson. See *Redd v. State*, Tex.Cr.App., 578 S.W.2d 129.

[7] Skillern's sixth, tenth, and twelfth grounds of error predicate error upon the trial court's action in overruling his challenges for cause to three prospective jurors. The three grounds can be dealt with together, inasmuch as Skillern has not shown how he was harmed by the impaneling of these jurors. Although Skillern exhausted his peremptory challenges, the trial court gave an extra one without request, and this extra strike remained unused. Skillern has not taken the steps prerequisite to a showing of harm. *Payton v. State*, Tex.Cr.App., 572 S.W.2d 677.

[8] Skillern makes the further contention that the trial court improperly restricted his cross-examination of venireperson Bracht. In *Emanus v. State*, Tex.Cr.App., 526 S.W.2d 806, the Court discussed the situation in which counsel's voir dire examination has been limited as to one prospective juror only. It was stated:

> "'The test for ascertaining harm in such cases is whether the trial judge's limitation of the voir dire examination amounted to an abuse of discretion, thus depriving appellant of a valuable right. (citations omitted.)"

It was also observed that in such cases:

> "The fact ... that appellant did not exercise all his peremptory challenges, is relevant ... and mitigates the harmfulness of any error."

In the case at bar there was no abuse of discretion. The prospective juror stated she could render an impartial verdict. The proposed questions were cumulative of those already asked and answered. Moreover, appellant Skillern did not exercise all his peremptory challenges. Error, if any, was harmless. *Emanus*, supra. Skillern's sixth, tenth, and twelfth grounds of error are overruled.

[9] Skillern's eighth ground of error questions the action of the trial court "in advising prospective juror Ollie Gray, implicitly, that this defendant may have had a prior felony record." The record reflects that objection to the remark was not made at the first opportunity, and no reason for delay has been shown. Therefore, nothing is preserved for review. *Garcia v. State*, Tex.Cr.App., 573 S.W.2d 12. Moreover, our reading of the record convinces us that the court's remark was not improper. This ground of error is overruled.

[10] Sanne's thirteenth ground of error contests the denial of his challenge for cause to venireman Harold D. Fields. In view of the fact that appellant expressly accepted the juror and that Skillern exercised a peremptory challenge against this venireman, the contention now made is without merit. This ground of error is overruled.

EVIDENCE ISSUES

Sanne's tenth ground of error and Skillern's fourteenth ground of error challenge the admissibility of evidence obtained as the result of an arrest and search, which appellants contend were unlawful because made without a warrant. A short account of the facts surrounding the arrest and search will be given first.

Hector Sanchez, then a narcotics agent with the Department of Public Safety, testified he received a telephone call at his home in Harlingen at approximately 10:45 p. m. on October 23, 1974, from agent Dennis Vickery. Vickery requested Sanchez to go out and look for a white-over-orange Camaro vehicle bearing a certain license number. Sanchez also learned from Vickery that the deceased, an undercover narcotics agent, had been seen leaving in this vehicle from a motel in Beeville with two persons, one of whom was driving the Camaro. Vickery told Sanchez to look around Gary Jackson's house in San Benito, because the narcotics that the deceased was to purchase supposedly belonged to Jackson. Sanchez picked up Tom Daniel, his partner, and Sergeant Chris Trevino of the Harlingen Police Department and drove to the area indicated by Vickery. At about 12:05 a. m., after driving in the Harlingen and San Benito areas, Sanchez spotted the vehicle parked at a 7–11 convenience store in Harlingen. He and Trevino kept the Camaro under surveillance while Daniel stationed himself in his car at a short distance. Trevino called the Department of Public Safety dispatcher and learned that the Camaro was on a stolen list. When the Camaro drove away from the store and south on Highway 77, Sanchez and Trevino preceded it and Daniel followed immediately behind it. After proceeding a few miles in this manner, Sanchez stopped the Camaro, which was occupied by appellants. When asked whether he was carrying a weapon, Skillern pointed to his belt. A pistol, later identified as having belonged to deceased, was found and the two appellants were placed under arrest.

[11–13] Both appellants assert that the officers acted unlawfully in failing to procure a warrant before stopping, arresting, and searching them. Probable cause to stop and detain the occupants of the automobile arose when the officers learned that the automobile was stolen. Since the officers were faced with a moving vehicle reported as stolen, it was not necessary to procure a warrant before taking action. Unlike the situation presented in *McDole v. State*, Tex.Cr.App., 579 S.W.2d 7, relied upon by Sanne, the facts in the instant case show that a valid exception to the warrant requirement did develop immediately prior to the arrest and search. Arrest was also authorized when Skillern was found in possession of a pistol. All evidence obtained as a result of the arrest was admissible.[4] Moreover, appellant Sanne lacked standing to challenge the admission of the gun, a ring, and money which were taken from the possession of Skillern. *Wilder v. State*, Tex.Cr.App., 583 S.W.2d 349. These grounds of error are overruled.

[14] In Sanne's fourteenth ground of error he argues reversible error was committed when the trial court failed to strike the testimony of the State's ballistics expert, Fred Rymer, when it became apparent that he could not express an opinion respecting S–57, the .38 revolver introduced. We need not reach the merits of this ground. Testifying in his own behalf, Sanne admitted he shot the deceased with a .38 revolver obtained from Red Andrews. This admission would be sufficient to render harmless any error committed in admission of the expert testimony. Moreover, Andrews identified S–57 as the pistol he obtained for Sanne and Skillern. Coupled with Sanne's admission, Andrews' testimony constituted a positive identification of S–57 as the murder weapon. This ground of error is overruled.

[15] In Sanne's eleventh ground of error and Skillern's sixteenth ground of error, complaint is made of the admission of testimony by Eva Gonzales that the Camaro in which appellants were riding when arrested was stolen from her home in Austin. At another point in the trial, in the presence of the jury, testimony that the car was reported stolen was given without objection. Any complaint as to the admission of Gonzales'

4. The record does not support Skillern's contention that there was a general exploratory search of the vehicle. Assuming such did take place, no evidence recovered as a result thereof was admitted at the trial.

testimony was waived. *Crocker v. State*, Tex.Cr.App., 573 S.W.2d 190.

[16] Skillern's sixteenth ground of error also urges error in the admission of testimony by Ernest "Red" Andrews bearing on the theft of the Camaro, and on the acquisition of a .38 Smith and Wesson revolver, S–57, identified as the murder weapon. He also challenges the admission of testimony of appellant Sanne regarding other drug transactions in which Skillern was implicated. No objection was made to any of this testimony. Any complaint is therefore waived. These grounds of error are overruled.

[17] In his twelfth ground of error Sanne contends the trial court improperly admitted testimony of Bill Jonas because it implicated Sanne in an extraneous offense. Jonas' testimony established that a certain phone number at an address in San Benito was registered to Gary Jackson. The testimony did not, either expressly or by implication, show an extraneous offense. This ground of error is overruled.

[18] Skillern's seventeenth ground of error challenges the admission of sixteen different exhibits offered by the State. He alleges that the admission of these had a "cumulative" prejudicial effect. This ground of error is multifarious and presents nothing for review. Art. 40.09(9), V.A.C.C.P. We have, nevertheless, examined the various contentions raised within the single ground of error and have satisfied ourselves that none presents reversible error. This ground of error is overruled.

[19, 20] The eighteenth ground of error set out in Skillern's brief is addressed to the admission of testimony by Cruz Sanchez concerning appellant Sanne's reputation for truth and veracity. The prosecutor elicited the following testimony from the witness:

"Q. (By Mr. Butts): Sergeant Sanchez, would you tell the jury whether you know the general reputation for truth and veracity, in the community where he is best known, of Mr. Charles Victor Sanne?

"A. Yes, sir.

"Q. Is that reputation good or is it bad?

"A. Bad.

"Q. Sergeant Sanchez, is that reputation such as would entitle Mr. Sanne to be believed under oath?"

At this point, and before the last question was answered, objections to Sanchez's testimony were voiced. After some discussion and voir dire of Sanchez by the attorneys representing both appellants, the trial court instructed the jury not to consider the last question, but overruled the motion to strike the entire testimony. Even if it would be timely to object to the testimony after the witness answered that Sanne's reputation was bad, *Clapp v. Engledow*, 72 Tex. 252, 10 S.W. 462 (1888), no objection was made until the next question[5] was asked. The objection, therefore, was not urged at the earliest opportunity and nothing is presented for review. Moreover, cross-examination and voir dire of the witness revealed a basis for his testimony sufficient to qualify him. Any objection based on the remoteness of the time at which the witness became acquainted with Sanne's reputation would go the weight, not the admissibility, of the testimony. *Brown v. Perez*, 89 Tex. 282, 34 S.W. 725; 62 Tex.Jur.2d, Sec. 288 at 276. This ground of error is overruled.

PUNISHMENT PHASE ISSUES

[21] Appellant Skillern's fourth ground of error raises the contention that it was error to overrule his motion to quash the indictment and his special plea in bar which challenge the constitutionality of Article 37.071, V.A.C.C.P., because the second punishment issue "fails to afford the jury channeled and defined guidance and instruction as to what conduct or other factors may be appropriately considered by them" in determining whether defendant will probably commit criminal acts of violence that would

5. We note the form of the last question asked was correct. *Parasco v. State*, 168 Tex.Cr.R. 89, 323 S.W.2d 257.

constitute a continuing threat to society. This Court has already resolved this issue against appellant in *Jurek v. State*, Tex.Cr. App., 522 S.W.2d 934, affirmed 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929. The fourth ground of error is overruled.

In his twentieth ground of error Skillern complains of the admission, at the punishment phase, of the indictment alleging murder with malice of his brother, and of testimony by Ernest "Red" Andrews, that he was with Skillern and Sanne when they joked about having buried Skillern's brother under a concrete patio and that Skillern said he should have killed his brother's wife instead of his brother because she was the uglier of the two. Andrews also testified he made a trip to Houston with Skillern and Sanne for the purpose, which was never carried out, of burglarizing a house. Andrews related that when it was discovered that the "old man" was at home, Skillern said they would "just have to take care of" him. Skillern argues that all these matters exceeded the scope of "prior criminal record" under Art. 37.07, Sec. 3(a), V.A.C.C.P. We disagree.

[22] The contention that the indictment alleging murder with malice should not have been admitted because the conviction was for murder without malice was answered squarely against Skillern in *Fairris v. State*, Tex.Cr.App., 515 S.W.2d 921.

[23, 24] The evidence of joking conversations and the abortive burglary plans was admissible under Art. 37.071(a), V.A.C.C.P. The trial court has wide discretion in admitting or excluding evidence at the punishment phase of a capital murder trial. *Hammett v. State*, Tex.Cr.App., 578 S.W.2d 699, 709 and cases cited; Art. 37.071(a), V.A.C. C.P. ("evidence may be presented as to any matter that the court deems relevant to sentence"). In *Wilder v. State*, 583 S.W.2d 349, 361, this Court addressed the issue of admission at the punishment stage of a capital murder trial of statements by the defendants that they participated in a similar extraneous offense. It was held:

> "The statements introduced below were relevant to the jury's determination of *all three* questions under Article 37.071, supra. They shed light on both deliberateness and appellants' future criminal tendencies." (Emphasis added.)

In *Jurek v. State*, Tex.Cr.App., 522 S.W.2d 934, 939–940, the Court stated:

> "In determining the likelihood that the defendant would be a continuing threat to society, the jury could consider whether the defendant had a significant criminal record. *It could consider the range and severity of his prior criminal conduct* ...." (Emphasis added.)

And in *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976), the Supreme Court of the United States discussed the jury questions under Article 37.071, and significantly stated:

> "What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine."

In the case at bar, the evidence of the joking conversation was relevant, as were the statements in *Wilder*, on all three punishment issues. The same is true of the evidence of Skillern and Sanne's abortive plan to burglarize a Houston home, particularly the mention of readiness to kill if necessary to carry out their plan. See also *Garcia v. State*, Tex.Cr.App., 581 S.W.2d 168, 178–179. The evidence was properly admitted and this ground of error is overruled.

[25] In his fifteenth ground of error Skillern strenuously urges that the trial court erred in admitting the testimony of Dr. Joseph C. Rupp during the punishment phase of the trial because Rupp was shown to be incompetent to render an opinion on the second punishment issue, Article 37.071, V.A.C.C.P. We agree that Rupp, a practicing forensic pathologist, was not shown to be qualified to render an *expert* opinion under a hypothetical fact situation based on evidence introduced, that "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." The trial court could not properly have found, as

was required before qualifying Dr. Rupp as an expert witness, that he "had such skill, knowledge or experience" about human behavior "that it was probable his opinion would be of assistance to the jury in making a factual determination of whether there was a probability that appellant would commit criminal acts of violence and be a continuing threat to society in the future." *Battie v. State*, Tex.Cr.App., 551 S.W.2d 401, 407. Nor does the record reflect that Dr. Rupp had sufficient, if any, firsthand familiarity with Skillern's personal history to qualify him to express a lay witness opinion that Skillern would be a continuing threat to society. *Cf. Esquivel v. State*, Tex.Cr.App., 595 S.W.2d 517 (not error to allow former assistant district attorney and district attorney to express opinion with regard to probability of future acts of violence by defendant, based on knowledge of defendant's rape conviction and subsequent criminal history). The witness was not qualified to express his opinion that Skillern would be a continuing threat to society.

[26] Although it was error to allow Dr. Rupp to express his opinion as to the second punishment issue, our examination of the record in its entirety leads us to conclude that the error was harmless beyond a reasonable doubt. In making this determination, the question answered is whether there is a reasonable possibility that the evidence complained of might have contributed to the verdict. See *Harrington v. California*, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969); *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *Cunningham v. State*, Tex.Cr.App., 500 S.W.2d 820. We must look to the facts and circumstances of each case. *Ex parte Flores*, Tex.Cr.App., 537 S.W.2d 458.

Apart from Dr. Rupp's improper testimony, the evidence introduced at the punishment stage showed that appellant Skillern had been convicted in 1972 of murder without malice for the shooting of his brother and of passing a forged instrument. The testimony of "Red" Andrews with regard to the joking attitude taken by Skillern toward the murder, as well as Andrews' testimony concerning the plans to burglarize a house in Houston and to kill if necessary, has already been summarized. At the guilt-innocence stage, appellant Sanne testified he, Andrews, and Skillern had participated in a fifty pound marihuana deal in the Valley.

The facts of the offense charged are also relevant in the assessment whether the improper testimony of Dr. Rupp resulted in harm. At the guilt stage, Dr. Rupp testified that his general impression from viewing the scene was that the deceased had been taken unawares by someone who fired multiple shots from his right side. He stated that "there is an element of over-kill when you empty a revolver into the side of a victim." At the punishment phase, Rupp noted it was his impression that the deceased was suddenly shot without any chance for him to defend himself. Additionally, it should be noted that after shooting the deceased the appellants returned to the motel room where they had met him and took his wallet which contained, among other things, money that had been issued to him by the State. It was also established that a diamond ring belonging to the deceased was taken from the possession of Skillern. Further, at the time the appellants were arrested a pistol later identified as belonging to deceased was taken from Skillern.

On the basis of the foregoing summary of the evidence, which we believe was abundant in demonstrating appellant Skillern's antisocial personality, it is our conclusion that "the minds of an average jury would not have found the State's case [on the second punishment issue] less persuasive" had Dr. Rupp's opinion testimony not been admitted. See *Cunningham*, supra. The admission of this testimony was harmless error. This ground of error is overruled.

[27] The sufficiency of the evidence to submit the second punishment issue and the trial court's failure to define the terms "probability" and "criminal acts of violence," used in the submission of that issue, are the subjects of Skillern's twenty-second

ground of error. Our discussion of the last issue makes it clear that the evidence presented at the punishment phase, together with the evidence presented at the guilt phase, was sufficient to support the jury's verdict on the second punishment issue. In *King v. State*, Tex.Cr.App., 553 S.W.2d 105, it was held that the trial court need not provide special definitions for the terms "deliberately," "probability," "criminal acts of violence," or "continuing threat to society." This ground of error is overruled.

[28] In his twenty-first ground of error, Skillern argues there was no evidence to support submission of the first and third punishment issues in his case because Sanne did the shooting. It is established that the law of parties applies to these punishment issues in a capital murder case. *Smith v. State*, Tex.Cr.App., 540 S.W.2d 693. This ground of error is overruled.

Skillern's nineteenth ground of error presents ten separately numbered contentions pertaining to the jury charge given by the trial court. This ground of error, which is multifarious, is not in compliance with Article 40.09(9), V.A.C.C.P. and presents nothing for review. Moreover, none of the various complaints have any merit. This ground of error is overruled.

OTHER ISSUES

[29] Sanne's fifth ground of error challenges the trial court's refusal to grant his pre-trial motion for severance. He argues he did not have any prior felony convictions admissible against him and that the co-defendant Skillern did. Therefore, he contends, the mandatory provisions of Article 36.09, V.A.C.C.P., were violated when the severance was not granted. We disagree. In *Robinson v. State*, 449 S.W.2d 239, this Court wrote:

> "As we interpret Article 36.09, supra, the mandatory ground for severance that one defendant has 'a previous admissible conviction' against him is applicable only where one defendant has no prior criminal record or at least no prior admissible conviction and the co-defendant has a prior conviction or convictions which are admissible. *At either stage of the bifurcated trial, if the defendants all have prior admissible convictions*, the ground for severance must be based on the fact that 'a joint trial would be prejudicial' as a result thereof, i. e., the nature of the prior convictions against one defendant, the large number of such convictions admissible against one defendant as compared to those admissible against the other defendant, etc. Such ground for severance, however, is addressed to the sound discretion of the trial judge."

In the present case the State stipulated to co-defendant Skillern's prior convictions. Although it was alleged that the probationary period of Sanne's prior conviction had expired, no evidence was offered in support of this allegation. Thus, Sanne's prior conviction was admissible at either stage of the trial. Articles 37.07, Sec. 3(a), 37.071, and 38.29, V.A.C.C.P. A severance was not mandatory. Further, no evidence was offered to show how Sanne would be prejudiced by a joint trial with his co-defendant. Absent supporting evidence, no abuse of discretion could have occurred in overruling the motion. *Ransonette v. State*, Tex.Cr.App., 550 S.W.2d 36, 41; *Robinson v. State*, supra. This ground of error is overruled.

[30] Appellant Sanne's sixth ground of error complains of the trial court's failure to grant his motion for severance at the end of the guilt stage and before evidence on the punishment phase was heard. This contention is without merit for two reasons. First, the motion was not timely urged. *Robinson*, supra. Second, we have already reached a result favorable to appellant with respect to his double jeopardy claim addressed to punishment. This ground of error, therefore, need not be considered. See *Marini v. State*, Tex.Cr.App., 593 S.W.2d 709.

[31] Skillern's thirteenth ground of error presents his contentions with regard to the trial court's failure to grant his motion for severance. No evidence was offered in support of the motion, either at the pre-trial stage or when it was reurged prior to the

testimony of co-defendant Sanne. The failure to present evidence in support of the motion is reason enough to sustain the trial court's action. *Robinson*, supra. At the time the motion was presented and refused there was no showing that the trial court was apprised of the allegedly inconsistent defenses. The contention as to this aspect of the motion for severance is without support in the record. See *Calverly v. State*, Tex.Cr.App., 511 S.W.2d 60; *Bolding v. State*, Tex.Cr.App., 493 S.W.2d 186. Skillern's thirteenth ground of error is overruled.

[32] In Sanne's ninth ground of error it is asserted that the trial court abused its discretion in failing to grant his pre-trial motions for continuance for a two-week period in order to prepare for trial. The effect of the trial court's action, Sanne contends, was to deny him the effective assistance of counsel. We are not convinced that error has been shown.

Sanne's basic contention is that the time from the date counsel was appointed, February 20, to the date the trial commenced, March 13, was insufficient in view of the complexity and gravity of the case. At a pre-trial hearing held on March 8, the trial court authorized the maximum amount of five hundred dollars allowed by statute for investigative expenses. See Article 26.05(1)(d), V.A.C.C.P. Appellant argues, however, that there was not enough time between the pre-trial hearing and the commencement of trial in which to procure the services of an investigator or ballistics expert. However, Sanne has not shown by bill of exception or motion for new trial what testimony would have been obtained from such investigator or expert. As to this contention, nothing is preserved for review.[6]

Additionally, Sanne's counsel places emphasis on the fact that this was his first capital murder trial and that he was deprived of an essential opportunity to familiarize himself with the record in the first trial. At the pre-trial hearing, counsel testified he had read the statement of facts from the first trial, but that he felt he also needed to read the voir dire examination of prospective jurors. This testimony demonstrates that counsel did discharge his burden of acquainting himself with the facts of the case. Cf. *Flores v. State*, Tex.Cr.App., 576 S.W.2d 632. On the basis of the record before us, we cannot say that appellant Sanne was denied effective assistance of counsel. The claim is not, as it must be in order to be meritorious, firmly founded. *Faz v. State*, Tex.Cr.App., 510 S.W.2d 922, 926. Absent a showing of how he was prejudiced by the fact that counsel had only twenty-two days to prepare his defense, we cannot agree that the trial court abused its discretion in overruling Sanne's motion for continuance. See and compare *Davis v. State*, Tex.Cr.App., 513 S.W.2d 928; *Hicks v. State*, Tex.Cr.App., 508 S.W.2d 400; *Coleman v. State*, Tex.Cr.App., 481 S.W.2d 872. Sanne's ninth ground of error is overruled.

The failure to grant a motion for continuance is the subject of Skillern's first ground of error. Like Sanne, he focuses upon the short time given to prepare his defense and his lack of familiarity with the record of the first trial as the chief factors authorizing the continuance. He did not, however, offer proof of facts which the denial of his motion prevented him from discovering and proving, nor did he at any time state with specificity how any lack of familiarity with the record in the first trial adversely affected his handling of the instant prosecution. Skillern's claim that assistance of counsel was rendered ineffective by failing to grant the continuance is not firmly founded or supported by the record. See *Faz*, supra. Skillern's first ground of error is overruled.

[33, 34] In his third ground of error, Sanne urges reversible error was committed

6. Sanne's brief and supplemental brief also make reference to counsel's lack of opportunity to file a motion to set aside a former conviction when the period of probation had expired and to investigate the background of the deceased as to his propensity to violence and use of alcohol. Neither of these matters was mentioned in his motion for continuance or at the hearing thereon, and therefore are not reflected in the record on appeal.

when the trial court refused to grant his pre-trial motion for the appointment of additional counsel. Initially, we emphasize that appellant has failed to demonstrate that he was harmed by the trial court's ruling. Moreover, his reliance upon the "category of cases" principle set forth in *United States v. Watson*, 496 F.2d 1125 (4th Cir. 1973) and adopted by this Court in *Batten v. State*, Tex.Cr.App., 533 S.W.2d 788, is misplaced. As the State's brief succinctly notes, application of the "category of cases" theory presupposes the existence of a statutory provision addressed to the issue in question. Thus, in *Batten* it was held that when a prosecution is brought in Texas under the capital murder statutes, the defendant is entitled to all the procedural guarantees, including fifteen peremptory challenges of prospective jurors as provided by Article 35.15, V.A.C.C.P., whether or not the State "seeks" the death penalty. In contrast, Article 26.04, V.A.C.C.P., the statute which provides for the appointment of counsel for the indigent defendant, leaves the number of appointed counsel to the discretion of the trial court and does not distinguish between capital and non-capital cases. Thus, the "category of cases" principle is not applicable since there is no mandatory provision for the appointment of additional counsel in a capital case. Absent a showing of harm, it cannot be said that the trial court abused its discretion in refusing appellant's request. See generally, *Henry v. State*, Tex.Cr.App., 433 S.W.2d 430. This ground of error is overruled.

Skillern's complaint regarding the trial court's failure to appoint additional counsel is embodied in his second ground of error. As we have stated in passing on Sanne's claim, a defendant does not have an absolute right to the appointment of more than one attorney. In his motion addressed to this matter, Skillern sought the appointment of Douglas Tinker, who represented him in the first trial of this case. In *Ochoa v. State*, Tex.Cr.App., 492 S.W.2d 576, the defendant had filed a motion requesting that two named persons be permitted to assist his two court-appointed counsel. In holding the defendant's claim that his court-appointed counsel were ineffective to be without merit, it was stated:

> "We have examined the record and find that the [appointed] counsel ... actively participated in the trial, closely cross-examined the witnesses, and presented appellant's defense. There is an absence of any showing they were ineffective."

In the present case, there is no showing that Skillern did not receive adequate representation of counsel as the result of failure to appoint, or re-appoint, Douglas Tinker or to appoint any other additional counsel. Skillern's second ground of error is overruled.

[35] Appellant Skillern's third ground of error urges, without supporting argument or citation of authority, that the trial court erred in denying his motion to quash the indictment because the indictment failed to disclose affirmatively that it was presented subsequent to the date of the alleged offense. The indictment alleges that the offense was committed "anterior to the presentment of this indictment, ..." This was sufficient to meet the requirement of Article 21.02(6), V.A.C.C.P. This ground of error is overruled.

[36] Skillern's twenty-third, and final ground of error raises the allegation that he was denied his right of cross-examination and his right to effective assistance of counsel on numerous occasions throughout the trial when the trial court assumed the role of the prosecution. We have reviewed the record and have not discovered any conduct that would merit serious discussion.

As reformed to punishment by confinement for life, the judgment in cause no. 63,254, Sanne's appeal is affirmed. The judgment in cause no. 63,255, Skillern's appeal, is affirmed.

CLINTON, J., not participating.

PHILLIPS, Judge, dissenting.

An examination of this record reveals several reversible errors. The majority's treatment of these grounds of error is whol-

ly inadequate. For the reasons that follow, I dissent to the affirmance of these convictions.

I.

During the punishment phase of the trial, the state presented expert testimony on the issue of future dangerousness. The state elicited this testimony not from a psychiatrist or a psychologist, but from the pathologist who performed the autopsy on the deceased. In response to a hypothetical question, the pathologist expressed his opinion to a "reasonable medical certainty" that Doyle Skillern would constitute a continuing threat to society.

Skillern contends that the admission of this evidence, over his objection, was reversible error. The majority concedes that the trial court erred in permitting the pathologist to render an expert medical opinion on the second punishment issue. The majority concludes, however, that this error was harmless beyond a reasonable doubt.

In evaluating the majority's conclusion, it must be kept in mind that a jury's determination on the second punishment issue is qualitatively different from its determination on the guilt-or-innocence issue. Predicting future dangerousness is far less precise than resolving the issue of guilt or innocence. With this crucial difference in mind, let us now consider the type of evidence whose admission the majority deems harmless error.

It is widely recognized that many lay persons show an inordinate amount of deference to members of the medical profession. Consequently, prosecutors go to great lengths to obtain psychiatric testimony on the second punishment issue. They obviously believe that such testimony significantly influences a jury's punishment deliberations.

The only distinction between this testimony that prosecutors find so valuable and the testimony in the instant case is that here the testimony was given by a pathologist rather than a psychiatrist. However, the circumstances under which the pathologist testified suggest that this distinction was largely lost on the members of the jury. When defense counsel objected on the ground that the pathologist did not have the training and experience to render an expert medical opinion on the second punishment issue, the trial court made the following comment in the presence of the jury:

> THE COURT: There is no question but what the jury makes the decision but *this witness is a medical doctor and I believe that the testimony shows that he has studied human behavior, had experience with it,* and is giving this testimony to aid the jury, if it does. Overruled. (emphasis added.)

This statement was an expression of the trial court's opinion that the pathologist's training and experience in the field of human behavior qualified him to render an expert medical opinion on the issue of future dangerousness. As such, it constituted a comment on the weight of the evidence, in violation of Article 38.05, V.A.C.C.P. This comment enhanced the pathologist's standing in the eyes of the jury, thereby compounding the court's error in admitting his testimony. Moreover, the court permitted the pathologist to express his opinion in terms of a "reasonable medical certainty."

Expert medical testimony on the second punishment issue can have a significant impact on a jury's punishment deliberations. In holding that the admission of such testimony was harmless error, the majority necessarily concludes beyond a reasonable doubt that the pathologist's testimony could not have influenced even one of the 12 jurors to vote "yes" rather than "no" on the second punishment issue. Even viewed in its most favorable light, the majority's position is untenable.

At trial it was undisputed that Sanne, not Skillern, shot the deceased. Notwithstanding Skillern's prior conviction for murder without malice, jurors reasonably could have answered "no" to the second punishment issue. Jurors have supplied a negative answer to this issue in cases far more egregious than the present one. *See* D.

Crump & G. Jacobs, Capital Murder (1977) (the cases of John Stiles Griffin and Bernardino Sierra are cogent examples).

The majority's assertion that the pathologist's testimony could not have changed the vote of even one juror is a bold departure from reason. It simply cannot be concluded with the required degree of certainty that the admission of this evidence failed to contribute to the jury's assessment of the death penalty. The majority errs in holding this error harmless.

II.

Both Skillern and Sanne contend that the trial court committed reversible error in overruling their motions for a continuance. They submit that the court gave defense counsel insufficient time to prepare for trial. In separate grounds of error, they complain of the court's refusal to appoint a second defense attorney. The basic thrust of both claims, according to appellants, is that the trial court's actions denied them effective assistance of counsel. Under the facts of this case the two claims are functionally inseparable, and for that reason I will treat them together.

The record reflects that the trial court appointed one defense attorney to represent each appellant and set their cases for trial on March 13, 1978. This date was 21 days after the appointment of counsel. On three separate occasions the defense attorneys asked for a continuance because they needed more time to prepare for trial. On each occasion they specifically stated to the court their reasons for needing more time. In spite of the compelling nature of defense counsel's reasons, the court overruled all requests for a continuance.

One reason given by the defense attorneys was that they needed more time "to fully read and digest the voluminous record of the [prior] trial," at which appellants were represented by other counsel.[1] The attorneys pointed out that only one copy of that record was available, which they had to share.[2] The attorneys also told the court that sufficient time to review the record from the prior trial was essential to their providing effective representation.

The record reflects that the trial court gave defense counsel insufficient time to familiarize themselves with the statement of facts from the prior trial.[3] The value of a transcription of the court reporter's notes from a prior proceeding has been recognized by the Supreme Court. *See Britt v. North Carolina*, 404 U.S. 226, 92 S.Ct. 431, 30 L.Ed.2d 400 (1971). Where a defendant is indigent, the failure to furnish a free transcription generally is reversible error. *Id.* The corollary of appellants' right to have the statement of facts from the prior trial is that their attorneys must be given

1. That trial resulted in convictions that were reversed on appeal. *See Skillern v. State*, 559 S.W.2d 828 (Tex.Cr.App.1977). The record from that trial consists of 14 volumes and approximately 4,000 pages.

2. Skillern's attorney testified that it was necessary for Sanne's attorney to have the statement of facts during the week of February 20-26 because the following week Sanne's attorney had prior commitments.

3. Skillern's attorney testified that he had insufficient time to review the statement of facts. He added that such a review was necessary for proper trial preparation. Sanne's attorney testified that he had no time to read the parts of the statement of facts that concerned the argument of the preliminary motions and the examination of prospective jurors. He explained that a review of the voir dire was necessary because this was his first capital murder case.

The majority attaches great significance to the testimony of Sanne's attorney that he had the opportunity to read the testimony of the witnesses from the prior trial. This position ignores the value of other parts of the statement of facts. To render effective assistance of counsel, an attorney must become acquainted with the law of the case. *Flores v. State*, 576 S.W.2d 632 (Tex.Cr.App.1978). In several respects the law applicable in capital cases substantially differs from that applicable in non-capital cases. Because this was the first capital murder case for Sanne's attorney, an opportunity to review the voir dire and the argument of the preliminary motions would have been a valuable tool for his becoming acquainted with the law unique to capital cases. By denying him this opportunity, the trial court impaired Sanne's right to effective assistance of counsel.

enough time to read and familiarize themselves with it. By refusing to grant a continuance to allow defense counsel sufficient time to study the record, the trial court denied appellants effective assistance of counsel.

The defense attorneys also sought a continuance because they needed time to interview the key witnesses. Counsel pointed out that at the prior trial the state called more than 50 witnesses, none of whom lived anywhere near Rockport.[4] The attorneys stated to the court that interviewing some of these witnesses was absolutely essential to their providing effective assistance of counsel.

In response, the court suggested that reading the record of the prior trial was an adequate substitute for interviewing witnesses. Defense counsel were quick to point out the inadequacies of this approach. First, they had too little time to fully acquaint themselves with the record. Second, they were unable to evaluate the credibility of the witnesses by reading the record. Third, their reading of the record raised numerous questions that could be resolved only by interviewing witnesses. Moreover, the record of the second trial reflects that the state called critical witnesses who did not testify at the first trial.

After jury selection had been completed but before the evidentiary phase of the trial had begun, the trial court told defense counsel that they would be given an opportunity to interview the state's witnesses before they took the stand. However, the record reflects that because of the trial process defense counsel were able to interview only a few of the state's witnesses.

In *Flores v. State*, 576 S.W.2d 632 (Tex.Cr.App.1978), this Court held that "an attorney must acquaint himself ... with ... the facts of a case before he can render reasonably effective assistance of counsel." Writing for the Court, Presiding Judge Onion set forth the factors to be considered in determining the size of defense counsel's burden to become acquainted with the facts:

> ... The size of the burden on the counsel to acquaint himself with the facts will vary of course depending upon the complexities of the case, the plea to be entered by the accused, the punishment that may be assessed, and other such factors ...

Id. at 634. *See Callaway v. State*, 594 S.W.2d 440, 445 (Tex.Cr.App.1980).

When the factors enunciated in *Flores* are applied in the present case, it is clear that the defense attorneys had an enormous burden to acquaint themselves with the facts. Both appellants pleaded not guilty, and both were subject to the death penalty.[5] There was the usual complexity in a capital case of selecting a jury in accordance with *Witherspoon v. Illinois*,[6] and V.T.C.A.Penal Code, § 12.31(b). *Compare Adams v. Texas*, — U.S. —, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980) *with Moore v. State*, 542 S.W.2d 664 (Tex.Cr.App.1976). In addition, for a variety of reasons appellants' cases were unusually complex: (1) the voluminous record from the prior trial; (2) none of the state's witnesses lived in the county where the second trial was held; (3) the joint trial; (4) the unusually large number of witnesses called by the state; (5) the disputed issue involving ballistics; and (6) the expert medical testimony presented by the state on all three punishment issues.

Discharging the burden to become acquainted with the facts is not strictly an armchair pastime. Usually it requires that witnesses be interviewed and the facts otherwise investigated. Although studying the record from a prior trial is critical, it is not

4. Venue of appellants' cases was changed from Live Oak County to Aransas County.

5. Sanne filed a pretrial motion of former jeopardy concerning the death penalty because at his prior trial the jury answered the second punishment issue in the negative. The trial court overruled this motion, thereby subjecting Sanne to the death penalty. We recently have held, however, that the principles of double jeopardy apply to this situation. *Brasfield v. State*, 600 S.W.2d 288 (Tex.Cr.App.1980).

6. 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968).

an adequate substitute for independently investigating the facts. Unless counsel conducts an independent investigation, there is no way of knowing whether counsel at the prior trial adequately investigated the case.

In spite of the enormous burden on the defense attorneys to acquaint themselves with the facts, the majority concludes that counsel discharged this burden merely by reading the testimony of the witnesses from the prior trial. I cannot agree that such minimal preparation discharged this burden, nor can I associate myself with such a cavalier attitude toward an accused's constitutional right to effective assistance of counsel.

In the present case the record clearly shows that the trial court gave defense counsel insufficient time to interview witnesses and otherwise investigate the facts. This situation was not remedied by the court's authorization of $500 for investigation and expert testimony. The record also shows that, notwithstanding the defense attorneys' diligence, they had insufficient time to obtain the services of either an investigator or a ballistic expert.[7] In light of the enormous burden on defense counsel to acquaint themselves with the facts, the conclusion is inescapable that the trial court gave them insufficient time to discharge this burden. As a result, appellants were denied effective assistance of counsel, and the court's refusal to grant a continuance constituted an abuse of discretion.

In the alternative, given the 21 days allowed for trial preparation, the trial court abused its discretion in overruling appellants' motions for appointment of a second defense attorney. Had the court granted this motion, the 21 days might have been enough time for two defense attorneys to render effective assistance of counsel. Although I do not advocate a rule requiring the appointment of two defense attorneys in all capital cases, the complexity of such cases strongly suggests that appointing two attorneys almost always would be the better practice. This is especially true where, as here, at least one attorney had never before tried a capital case.

III.

In three grounds of error, Skillern contends that the trial court erred in overruling his challenges for cause to three prospective jurors. The majority summarily disposes of these grounds on the theory that Skillern failed to show how the trial court's rulings harmed him. The majority's treatment of these contentions is as follows:

> ... The three grounds can be dealt with together, inasmuch as Skillern has not shown how he was harmed by the impaneling of these jurors. Although Skillern exhausted his peremptory challenges, the trial court gave an extra one without request, and this extra strike remained unused. Skillern has not taken the steps prerequisite to a showing of harm. *Payton v. State*, Tex.Cr.App., 572 S.W.2d 677.

Peremptory challenges are exercised differently in capital cases than in noncapital cases. In noncapital cases peremptory challenges are made after all prospective jurors have been questioned. *See* Arts. 35.25 & 35.26, V.A.C.C.P.; *Fuller v. State*, 409 S.W.2d 866 (Tex.Cr.App.1966). In capital cases, however, such challenges are exercised at the time a prospective juror is examined. *See* Arts. 35.13, 35.17, & 35.20, V.A.C.C.P.; *Fuller*, supra. In spite of this critical difference, the majority applies to a capital case a harmless error rule devised in the context of noncapital cases. *See Hernandez v. State*, 563 S.W.2d 947 (Tex.Cr.App.1978). The majority does so, without discussion or analysis, even though the application of this rule to capital cases is illogical.

Applying this rule to capital cases would make sense only if a defendant were permitted to exercise unused peremptory challenges after all prospective jurors had been examined. But such a procedure would violate the Code of Criminal Procedure. *See* Arts. 35.13, 35.17, & 35.20, supra; *Fuller*, supra. Moreover, in the present case the

7. The defense attorneys told the court that they needed to obtain the services of a ballistic expert. At the prior trial the court admitted in evidence a .38 revolver, and there was a disputed issue as to whether this was the murder weapon.

trial court twice refused Skillern's request that he be allowed to reserve the exercise of his peremptory challenges until all prospective jurors had been examined.[8]

The errors Skillern alleges could be rendered harmless only if he had been given three extra peremptory challenges that he was entitled to use retrospectively. Instead, he was given one extra challenge that could be used only prospectively. Consequently, the majority errs in holding that Skillern failed to show harm because he did not use his extra peremptory challenge.

Because of the errors discussed above, I dissent to the affirmance of these convictions. The judgments should be reversed and the causes remanded.

ROBERTS, J., joins in dissent.

Donald Ray MORRIS, Appellant,

v.

The STATE of Texas, Appellee.

No. 62737.

Court of Criminal Appeals of Texas, Panel No. 1.

Nov. 12, 1980.

Rehearing Denied Jan. 14, 1981.

Defendant was convicted before the 196th Judicial District Court, Hunt County, William C. Parker, J., of aggravated robbery, and he appealed. The Court of Criminal Appeals, Tom G. Davis, J., held that trial court's charge to jury was fundamentally defective, in light of fact that it permitted a conviction on proof different from that required to prove the allegations of the indictment.

Judgment reversed and cause remanded.

Douglas, J., dissented.

McCormick, J., filed concurring opinion on denial of state's motion for leave to file motion for rehearing without written opinion.

1. Criminal Law ⇐814(1), 1172.6

When court's charge authorizes a conviction on theory not alleged in the indictment, the charge is fundamentally defective and reversal is mandated on direct appeal.

2. Robbery ⇐27(6)

In prosecution on aggravated robbery indictment alleging that defendant placed complainant in fear of imminent bodily injury, trial court's charge authorizing a conviction if jury found that defendant threatened or placed complainant in fear of imminent bodily injury was fundamentally defective, in light of fact that it permitted a conviction on proof different from that required to prove allegations of the indictment.

8. [Skillern's attorney]: Your Honor, Defendant Skillern has no challenge for cause and, at this time, I will reserve my right to exercise any peremptory strikes.

THE COURT: Reserve it? Either accept the juror or challenge her peremptorily.

[Skillern's attorney]: Your Honor, that denies the defendant the right that he has in any non-capital criminal case in this State to have impaneled a number of qualified jurors who are not subject to challenge for cause and then exercise sensibly and intelligently the limited number of peremptory strikes that are available to him. I object to that procedure and for that reason claim my right to defer exercising peremptory challenges until the panel is completed.

THE COURT: Well, either accept the juror or reject her....

* * * * * *

[Skillern's attorney]: Your Honor, Defendant Skillern offers no additional challenge for cause and again I reserve the right to make peremptory challenges until such time as—

THE COURT: Make it now.

[Skillern's attorney]: Has the Court overruled my right to reserve peremptory challenges at a time later? Let the record reflect that I reiterate the same objection that I have before.

THE COURT: All right. Same ruling....

APPENDIX B

TEXAS COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS

THE STATE OF TEXAS
vs.
DOYLE EDWARD SKILLERN
(CO-DEFENDANT)

WRIT OF MANDAMUS

CAUSE No. 1996
Live Oak County
APPEAL No. 55,337
Tex. C.C.A.

Re: APPOINTMENT OF COUNSEL

Now comes the petitioner, DOYLE EDWARD SKILLERN, who is not a learned student of the law, and prays that the court will accept this document in it's present form as a WRIT OF MANDAMUS. Further, the petitioner also states that the following statements are true and entertains the court for it's just consideration of the facts.

Briefly stated, the petitioner, DOYLE EDWARD SKILLERN, has assumed, as has his counsel, Douglas Tinker, that this being a re-trial of the same case that the appointment of counsel still remains. Mr. Tinker's continued representation is desired by the petitioner because of his experience and knowledge of the law. Mr. Tinker has expressed his willingness to continue his representation or be re-appointed by the District Judge. (See attached exhibit.)

I

In October, 1974, said petitioner, DOYLE EDWARD SKILLERN, was arrested and charged with a Capital Offense. Petitioner was indigent and during a hearing in November, 1974, the Honorable John H. Miller appointed counsel for the petitioner. Attorney Douglas Tinker, Corpus Christi, Texas, was the appointee.

II

Further, Attorney, Douglas Tinker represented the petitioner, DOYLE EDWARD SKILLERN, during the entire trial of the above numbered cause.

III

Further, upon conviction, Attorney Tinker gave notice of appeal and did in fact execute the Appelants Brief brought before this court. The case was reversed December 21, 1977, in the Texas Court of Criminal Appeals.

B-1

IV

On February 11, 1978, during a Change of Venue hearing, held in George West, Live Oak County, Texas, the petitioner, DOYLE EDWARD SKILLERN, presented exhibit number one (#1) in open court. It was marked and placed in the file. The Judge denied the petitioner, DOYLE EDWARD SKILLERN, to have Attorney Tinker to continue as his appointed counsel. A change of venue was ordered to Aransas County, Texas, which is in the same district.

Now comes the petitioner, DOYLE EDWARD SKILLERN, asking that the court order District Judge John H. Miller, to allow Attorney Tinker to continue as his counsel or re-appoint him as his counsel in his forthcoming trial.

PRAYER

Wherefore promise considered, petitioner respectfully prays that the Court accept this, his WRIT OF MANDAMUS, as such and intervenes at this time to protect the rights of the petitioner and further prays that the relief he seeks be granted.

Respectfully Submitted,

Doyle Edward Skillern
DOYLE EDWARD SKILLERN

DOYLE EDWARD SKILLERN, being first sworn under oath, presents that he has subscribed to the above and does state that the information therein is true and correct to the best of his knowledge and belief.

Doyle Edward Skillern
DOYLE EDWARD SKILLERN

Subscribed and sworn to before me this 15 day of Feb. (month), 1978 (year).

Theo Johnson
Notary Public

My commission expires

Aug. 1 79
(month, day, year)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

EX PARTE: DOYLE SKILLERN I NO.

APPLICATION FOR TEMPORARY RESTRAINING ORDER AND INJUNCTION

Now comes Doyle Skillern, Petitioner in the above cause, and moves the Court to enjoin and restrain any further proceedings in the case styled State of Texas vs. Doyle Skillern in cause number 1280-2 now pending in the 36th District Court of Aransas County, Texas, and, in the alternative, moves the Court to mandamus the trial judge, the Honorable Judge John Miller, to allow Petitioner's appointed attorney Douglas Tinker to continue to represent Petitioner in the trial of his cause, and in support of such motion would show the Court as follows:

1. Petitioner is charged with Capital Murder in an indictment which was returned by the grand jury in Live Oak County, Texas. Petitioner has, on a prior occasion, been tried and convicted of Capital Murder and received the death penalty. At the trial of this cause, the first time, the Honorable Judge Miller appointed Douglas Tinker as Petitioner's attorney. Petitioner was well satisfied with the services of Douglas Tinker and the said attorney, Douglas Tinker, was permitted by the trial court to appeal Petitioner's case to the Court of Criminal Appeals. Such case was reversed by the Court of Criminal Appeals as is reflected by a copy of the Court's opinion which is here attached as Exhibit One.

2. Subsequent to the reversal of the first trial, Petitioner was returned to George West, Live Oak County, Texas, and, at the first appearance in Court, prior to retrial, was informed by the trial court that Petitioner's attorney, Douglas Tinker, would no longer be participating in the case and that another attorney would be appointed for him. This statement by the Court was objected to by Petitioner; Petitioner taking the position that the said Douglas Tinker was still his appointed attorney and that the said Douglas Tinker was willing to continue as Petitioner's court appointed attorney.

A letter from Petitioner's court appointed attorney, Douglas Tinker, was filed in the trial court wherein such attorney agreed that he was willing to continue as Petitioner's court appointed attorney; however, the trial judge, Judge John Miller, refused to contact Douglas Tinker or continue Douglas Tinker's appointment. A hearing was held in which a local attorney was appointed to represent both this Petitioner and his co-defendant for the purpose of a change of venue hearing; whereupon the Judge transferred venue in this cause, cause number 1280-2, to Aransas County, Rockport, Texas, where Petitioner is now incarcerated. Subsequent to the transfer of this cause number 1280-2 to Rockport, Petitioner filed a Writ of Mandamus with the Court of Criminal Appeals in an effort to get the Court of Criminal Appeals to mandamus the trial judge into allowing Petitioner's court appointed attorney, Douglas Tinker, to continue as his appointed attorney. A copy of the Writ of Mandamus is attached as Exhibit Two for this record.

3. The Court of Criminal Appeals, on February 21, 1978, denied Petitioner's request as is reflected by the form from the Court of Criminal Appeals signed by the Administrative Assistant to the Court, Roy Greenwood, which is here attached as Exhibit Three.

4. Petitioner would submit to the Court that he has now exhausted his state remedies and that irreparable harm will result if this Court does not take immediate action concerning Petitioner's request herein made. The harm is imminent since, as is reflected by Exhibit Four here attached, a pretrial is to be held on the 8th day of March, 1978, at 10:30 a.m. in this case and pretrial motions must be filed prior to that date. Secondly, this case is set for trial on the 13th day of March, 1978; thus, if no action is taken immediately, Petitioner will be put to trial without his court appointed attorney, Douglas Tinker.

5. It is the sincere belief of Petitioner that the sole reason for appointing another attorney to represent him is to prevent Petitioner from having the attorney who has done such an excellent job for him in the past and to prevent the Petitioner from being found not guilty and/or from having this case reversed again on appeal.

6. Petitioner would submit to this Court that the trial court's action is a denial of effective assistance of counsel and due process as guaranteed by the Constitution of the United States of America.

WHEREFORE, PREMISES CONSIDERED, Petitioner moves the Court to immediately enter an order restraining the pretrial and trial in this cause until a determination can be made concerning the merits of Petitioner's request that the trial judge allow Douglas Tinker to continue as Petitioner's court appointed attorney. No harm will come to the State if this temporary restraining order is granted since during the appeal of this cause the State, by motion for continuance and extention of time, was able to delay the appeal and thus put off a retrial in this cause for well over a year.

Respectfully submitted

DOYLE SKILLERN, PETITIONER
Aransas County Jail
Rockport, Texas 78382

CERTIFICATE OF SERVICE

I, Doyle Skillern, hereby certify that a true and correct copy of the foregoing Application for Temporary Restraining Order and Injunction and its exhibits have been mailed to Mr. Robert Berg, Assistant United States Attorney, 521 Starr Street, Corpus Christi, Texas 78401, on this _____ day of _____, 1978.

DOYLE SKILLERN

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

EX PARTE: DOYLE SKILLERN § NO.

APPLICATION FOR WRIT OF MANDAMUS

Now comes Petitioner and moves this Court to grant a writ of mandamus ordering the trial judge, John Miller, in cause number 1280-2 to continue the appointment of Douglas Tinker as Petitioner's trial attorney and in support of such motion would refer to the Court Petitioner's application for a restraining order and injunction filed with this petition on this date.

Petitioner would show the Court that the allegations in such motion support Petitioner's position here that Douglas Tinker should continue as his attorney.

WHEREFORE, PREMISES CONSIDERED, Petitioner moves this Court to enter its order ordering the District Judge John Miller in Rockport, Aransas County, Texas, to continue the appointment of Douglas Tinker as Petitioner's trial attorney.

Respectfully submitted,

DOYLE SKILLERN, PETITIONER
Aransas County Jail
Rockport, Texas 78382

CERTIFICATE OF SERVICE

I, Doyle Skillern, hereby certify that a true and correct copy of the foregoing Application for Writ of Mandamus has been mailed to Mr. Robert Berg, Assistant United States Attorney, 521 Starr Street, Corpus Christi, Texas 78401, on this _____ day of _____, 1978.

DOYLE SKILLERN, PETITIONER

APPENDIX C

Now therefore if you find from the evidence beyond a reasonable doubt that on or about the 23rd day of October, 1974, in the County of Live Oak and the State of Texas that the defendant Doyle Edward Skillern was acting as a party within the meaning of the word "party" as the same is defined in Paragraph 6 of this charge, and that while so acting, if he was, that the defendant, Charles Victor Sanne did then and there intentionally cause the death of Patrick Allen Randel by shooting him with a gun; if he did, and that the said Charles Victor Sanne did then and there intentionally cause the death of the said Patrick Allen Randel, if he did, in the the course of committing or attempting to commit robbery as that term has heretofore been defined to you, then you will find defendant, Doyle Edward Skillern guilty of the offense of capital murder as charged in the indictment, and so say by your verdict. You are further instructed that the law of self-defense, as hereinafter defined, does not apply to this paragraph.

But if you do not so believe, or if you have a reasonable doubt thereof, you will acquit the defendant, Doyle Edward Skillern, of the offense of capital murder and will then proceed to decide under the instructions in Paragraph 8 of this charge, whether he is guilty of the lesser included offense of murder.

APPENDIX D

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

NO. 78-772

DOYLE E. SKILLERN, Appellant	§	APPEAL FROM THE 36TH DISTRICT
VS.	§	COURT OF ARANSAS COUNTY
THE STATE OF TEXAS, Appellee	§	TRIAL COURT NO. 1280-2

TO THE HONORABLE JUDGES OF THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS:

NATURE OF THE CASE

Appellant, Doyle Edward Skillern, was convicted of the offense of Capital Murder in the District Court of Aransas County, 36th Judicial District of Texas, on March 30, 1978, pursuant to jury verdict, and on March 31, 1978, pursuant the verdict of jury, his punishment was assessed at death.

Trial of this case commenced on March 13, 1978 and was completed with the verdict of the jury on punishment on March 31, 1978.

Following the Court's overruling of an Amended Motion for New Trial, Appellant and Co-Appellant, Charles Victor Sanne were formally sentenced to death at high noon on Friday, May 19, 1978.

On the trial of this cause, as well as on this appeal, Appellant has been represented by the undersigned Court-Appointed Counsel, and no one else.

FIRST GROUND OF ERROR

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR CONTINUANCE AS ORIGINALLY URGED AT PRE-TRIAL HEARING HELD ON MARCH 8, 1978, AND AS RE-URGED ON MARCH 13, 1978, PRIOR TO COMMENCEMENT OF VOIR DIRE EXAMINATION OF THE SPECIAL VENIRE, AND AS RE-URGED ON MARCH 21, 1978, FOLLOWING SELECTION OF THE JURY, COMPELLING THIS DEFENDANT TO BE PUT TO TRIAL UPON A CHARGE OF CAPITAL MURDER BY AND THROUGH COURT-APPOINTED COUNSEL TWENTY-TWO DAYS FOLLOWING APPOINTMENT OF SUCH COURT-APPOINTED COUNSEL. (Amended Motion for New Trial, 5, 14, 47).

Appellant recognizes that his Motion for Continuance is addressed to the sound discretion of the Trial Court. Reed vs. State, 244 S.W.2d 821 (1952), Article 19.01, CCP, and that good cause must be demonstrated therefor. It was, and the Trial Court abused that discretion in denying the requested continuance.

Significantly, and perhaps uniquely, the state did not object to Appellant's Motion for Continuance or to that of his Co-Defendant, Sanne, (SF-44). That was the First Motion for Continuance and was heard by the Court on March 8, 1978, only five days prior to the commencement of the trial as originally set by the Court on the appointment of the undersigned attorney for this Appellant on February 20, at which time were heard all of numerous pre-trial motions filed by this Appellant and Appellant Sanne. Skillern's counsel, as did Sanne's, took the stand under oath to testify concerning the reasons why they deemed a Continuance necessary in order to represent effectively their respective clients (SF-34-47). The entirety of Volume 2 of the Statement of Facts is referred to for a particular description of the nature and character

of the pre-trial motions filed and to the summary treatment of them by the Court, including the summary denial of Motions to Suppress Evidence without benefit of an evidentiary hearing. (SF-116-125).

Preparation for trial in a case of this magnitude required at a minimum, the study of the record of the former trial herein conducted in George West, Live Oak County, consisting of 15 volumes and several thousand pages, before counsel could make an informed and sensible determination of how to conduct the defense of this case, and by reason of the Court's having set all pre-trial motions for hearing on March 8, five days prior to the commencement of trial, even the matter of legitimate discovery of the State's evidence, and other matters encompassed in Defendant's Motion for Discovery, had to be delayed until the following day, and not in Rockport, Aransas County, but in Sinton, in the office of the District Attorney. Twenty-two days were not enough, five days following hearing of pre-trial motions were not enough, and four days following the first opportunity to see the State's evidence that was made available was certainly not enough.

Appellant refers to and incorporates herein the matters sworn to in his motion for continuance, alludes to his separate and distinct motion for the appointment of additional counsel in this regard, and says that the Court's denial of his motion for continuance was the effective denial of the effective assistance of counsel, and abuse of discretion

under the totality of the circumstances in this case that requires reversal and the remanding of this case for a new trial.

SECOND GROUND OF ERROR

THE TRIAL COURT ERRED IN OVERRULING DEFENDANT'S MOTION FOR APPOINTMENT OF ADDITIONAL COUNSEL, DENYING THIS DEFENDANT THE EFFECTIVE ASSISTANCE OF COUNSEL (Amended Motion for New Trial, 4).

Defendant, incorporates herein each and all of the matters set forth under First Ground of Error and would show that the Court's denial of his Motion to Require the Appointment of Additional Counsel in the person of Douglas Tinker, a member of the bar of Corpus Christi, and being one in the same person who was appointed to defend, and who did defend this Defendant in the first trial hereof in Live Oak County, constituted a denial of this Defendant's right to the assistance of counsel to the effective assistance of counsel, and to the assistance of chosen counsel, whether chosen by himself or by the Court, in violation of the Sixth Amendment to the United States Constitution. Harling vs. United States, Court of Appeals, District of Columbia, June 21, 1978. No prejudice need be shown, nor must Defendant show that newly appointed counsel, as of February 20, 1978, performed ineptly, or not at all, or otherwise. There is no evidence of record to demonstrate that Douglas Tinker was ever relieved of his appointment and continuing representation of this Defendant, this Defendant's Motion speaks for itself in demonstrating his efforts to secure the continued representation of Mr.

Tinker, his "chosen counsel", the denial of which is an abridgment of a constitutional right requiring reversal of this case. See also United States vs. Watson, 496, F.2d 1125 (1973). Attached hereto as Exhibit A is this Defendant's Writ of Mandamus filed in this Court in Appeal No. 55,337 together with this Defendant's Application for Temporary Restraining Order and Injuction filed in the United States District Court, Southern District of Texas, Corpus Christi Division, all seeking relief in the form of the continuation of representation by the said Douglas Tinker of this Defendant, to no avail.

Morover, in the circumstances set forth under First Ground of Error above, and recognizing that Mr. Tinker had, in preparation for the trial of this case on the first occasion, approximately two months within which to prepare, as opposed to the undersigned counsel's twenty-two days (if we count every day as an effective day, which cannot be, see first ground of error above) then certianly the denial of the appointment of additional counsel in the person of Mr. Tinker, or at least the appointment of someone as additional counsel, was a deprivation of this Defendant's constitutional right to the assistance and effective assistance of counsel. Such denial requires reversal and a new trial of this case.

THIRD GROUND OF ERROR

THE TRIAL COURT ERRED IN DENYING DEFENDANT's MOTION TO QUASH THE INDICTMENT (NO. 19) BECAUSE SUCH INDICTMENT TOGETHER WITH ALL OTHER RELEVENT AND MATERIAL RECORDS FAILED TO DISCLOSE AFFIRMATIVELY THAT SAID INDICTMENT WAS PRESENTED SUBSEQUENT TO THE DATE OF THE ALLEGED OFFENSE. (Amended Motion

APPENDIX E

the officer's concomitant right to perform a frisk or pat search for weapons can in no wise permit a general exploratory search of the vehicle, as was done in this case. It was purely officer Sanchez' hunch that Randel might well occupy the vehicle. It is also clear from his testimony that the weapon found on Defendant Skillern's person formed no basis for the subsequent search or the arrest, for it was not a until the following morning that he recalled and communicated to another agent his having seen a similar weapon in possession of agent Randel at some time in the past in Portland.

There having been time to obtain a warrant, during the surveillance by three officers in two vehicles, officer Sanchez having abandoned any basis in the reportedly stolen character of a vehicle as a reason for his stopping same, and having no more than an inarticulate hunch based upon agent Vickery's communication to him for such stop, the subsequent arrest and all evidence obtained as a result thereof were clearly inadmissible. Wong Sun vs. U.S., 371 U.S. 471.

FIFTEENTH GROUND OF ERROR

THE TRIAL COURT ERRED IN ADMITTING IN EVIDENCE OVER THIS DEFENDANT'S OBJECTION, THE TESTIMONY OF DOCTOR JOSEPH C. RUPP IN ITS ENTIRETY DURING THE PUNISHMENT PHASE OF THIS TRIAL BECAUSE DOCTOR RUPP WAS SHOWN TO BE INCOMPETENT TO RENDER THE OPINION TESTIMONY THAT HE DID, AND SUCH TESTIMONY INVADED THE PROVINCE OF THE JURY. (Amended Motion for New Trial, No. 101).

Although qualified during the guilt or innocence stage of this trial as a forensic pathologist and having testified

that he has been a professional pathologist since approximately 1961, engaging solely and exclusively in that specialty, nonetheless some opinions rendered by Doctor Rupp during the guilt or innocence stage of the trial (S.F. 1692-1742) would appear strained, namely, anyone's ability to render an opinion after the fact of the actions of the decedent prior to his death, nonetheless those opinions were admitted in evidence.

However, during the punishment phase of this trial, Doctor Rupp testified (S.F. 2816-2850), in sum, that he possessed no professional degrees or experience in the fields of psychiatry or psychology. The trial court denied this Defendant the right to Counsel and the right to cross-examination of this witness in attempting to question him regarding his qualifications to engage in the practice of psychiatry and indeed assumed the role of the prosecutor in this instance, the witness' repeated remarks being only that he was liscenced to practice medicine and surgery in the State of Texas.

In order to authorize the use by the prosecution of Doctor Rupp's testimony concerning the predictability of future human behavior, it was necessary that the trial court determine that behavior patterns of this Defendant "are so related to some scientific profession as to be beyond the knowledge of the average layman;" and that Doctor Rupp had such skill, knowledge or experience in the field of psychiatry that it was probable his opinion would be of assistance to

the jury in making a factual determination of whether there was a probability that Skillern would commit criminal acts of violence and be a continuing threat to society in the future. Battie vs. State, 551 S.W.2d 401. Thus, the trial court would have to conclude based upon common knowledge, and implicitly, that there being no evidence of any type of examination of this Defendant, psychiatric or otherwise by any medical practitioner, that this Defendant's behavior patterns were beyond the knowledge of layman, and that Doctor Rupp's knowledge and experience in the field of predictability of future human behavior would assist the jury. The record is silent. It contains no evidence whatsoever upon which anyone could find that Doctor Rupp possessed such qualifications. Patently, cutting up dead bodies, weighing brains and livers, and examining tissues under a microscope during a professional career of almost 20 years, does not, in the common knowledge of anyone, qualify one to predict, without benefit of any examination of the Defendant, future human behavior. Indeed, the General Practitioner referred to by Doctor Rupp as commonly treating emotional problems of patients, would clearly be more qualified than Doctor Rupp in that regard. If the entire field of psychiatric expertise be questioned concerning the validity of such an ability to predict future dangerousness, 30 Baylor Law Review 35, 55 Texas Law Review 1343, including recognition of the plain fact that empirical studies have demonstrated that such opinions are not accurate, how much less credible can be the

opinions of a professional pathologist.

There was simply no basis, either in common knowledge, or in evidence, upon which the trial Court could find Doctor Rupp qualified to render such opinion testimony. Its prejudicial effect was incalculable. Smith vs. Estelle, 445 F. Supp. 647 (U.S. District Court, Dallas, 1977) condemned, at least, the surprise element. The admission of incompetent expert testimony concerning the crucial special issue no. 2 in a Capital Murder case, special no. 1 and 3 having in effect been already determined by the guilt or innocence phase of the trial, cannot be said to be harmless, particularly when it came from the same mouth that rendered opinion testimony concerning the "deliberateness" in effect on the guilt or innocence stage.

SIXTEENTH GROUND OF ERROR

THE TRIAL COURT ERRED IN ADMITTING IN EVIDENCE THE TESTIMONY OF EVA GONZALES OF AN EXTRANEOUS CRIMINAL TRANSACTION AS WELL AS THE TESTIMONY OF ERNEST M. "RED" ANDREWS IN THAT REGARD AND CONCERNING A 38 CALIBER SMITH AND WESSON REVOLVER. (Amended Motion for New Trial, No. 58, and 78).

The testimony of Miss Gonzales (S.F. 1999-2013) and that of Ernest M. "Red" Andrews (S.F. 2431-2459) effectively informed the jury that Miss Gonzales' automobile had been reported stolen by her, following her having loaned it to the Defendants on at least one occasion, that Red Andrews had been with the Defendants when a key was made with which to operate the Camaro vehicle belonging to Eva Gonzales, and the obtaining by these Defendants of a 38 caliber Smith & Wesson revolver (States Exhibit No. 57) and this Defendant's

APPENDIX F

conduct of another, respecting mere association by a person on trial with another, mere knowledge of the commission of a crime standing alone, and mere possession by one of property belonging to another standing alone, and mere presence of this Defendant at the scene of a crime.

Each and all of the foregoing errors by the Court in its charge, both of omission and commission, were prejudicial to this Defendant's right to be tried upon the charge made by the indictment, and the legally competent evidence introduced in support of such charge, in accordance with article 36.14, Code of Criminal Procedure.

TWENTIETH GROUND OF ERROR

THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE, OVER THIS DEFENDANT'S OBJECTION, STATE'S EXHIBIT 74, THE INDICTMENT ALLEGING MURDER WITH MALICE AFORETHOUGHT OF ONE MILTON SKILLERN, DURING THE PUNISHMENT PHASE OF THE TRIAL, AND LIKEWISE IN ADMITTING THE TESTIMONY OF ERNEST M. "RED" ANDREWS DURING THE PUNISHMENT PHASE OF THE TRIAL. (Amended Motion for New Trial, Nos. 95, 97 & 98).

Article 37.07 and 37.071, Code of Criminal Procedure, govern, and permit the introduction in evidence, respectively, of the Defendant's prior criminal record and "any matter that the Court deems relevent to sentence." As to prior criminal record, the term is specially defined in Section 3(a) of Article 37.07 to mean "a final conviction in a court of record." Defendant did not object to the admissability of the judgment and sentence that followed the indictment which is State's Exhibit 74, for they demonstrated the final conviction of this Defendant for the offense of murder without malice, but it is submitted that the term "conviction"

as used in Article 37.07 means simply what it says and excludes from consideration by the jury that with which the Defendant was charged, the universal rule being that an indictment is no evidence of guilt. To allow in evidence the indictment for murder with malice aforethought was to inform the jury and permit it to consider to some extent details of an offense charged, but of which the Defendant was not finally convicted. Notwithstanding this Court's opinion in Knox v. State, 487 S.W.2d 322, to the effect that the pleadings, including indictment, complaint and information are admissible in demonstrating an accused's "prior criminal record", it is submitted that such "holding" was dicta, wholly unnecessary to the determination made in that case.

The testimony of Ernest M. "Red" Andrews during the punishment phase respecting joking conversations concerning this Defendant's brother's body, the pooring of concrete over it, and comments respecting such deceased brother's wife, were likewise incompetent, beyond the purview of "prior criminal record", and were introduced solely to show details of such prior offense, and equally as prejudicial was Mr. Andrew's testimony concerning the trip made by this Defendant, Co-Defendant Sanne and Mr. Andrews to Houston, permitting the jury to infer and speculate upon something that never occurred (other than a drive to Houston) and to speculate on extraneous offenses as based upon Mr. Andrew's own interpretation and opinion of the comments made by

APPENDIX G

for New Trial, 11).

FOURTH GROUND OF ERROR

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO QUASH INDICTMENT (NO. 20) AND IN DENYING DEFENDANT'S SPECIAL PLEA IN BAR (NO. 3) BECAUSE THE CAPITAL MURDER STATUTE OF THE STATE OF TEXAS, AS ADMINISTERED AND CONSTRUED BY THIS COURT, IS UNCONSTITUTIONAL UNDER THE 8TH AND 14TH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES. (Amended Motion for New Trial, 3, 11, and 12).

The proscription of Furman vs. Georgia and Branch vs. Texas, 408 U.S. 238 (1972) holding constitutionally defective the former Capital Murder Statute of this state, by reason of the unbridled and unfettered discretion afforded the jury in assessing the Death Penalty, has not in fact been cured by the present Capital Murder Statute, Article 19.03 of the Penal Code and the complementing sections of the Code of Criminal Procedure, Section 37.071 and the three special issues that must be answered by the jury, because such special issues, particularly special issue number 2, demanding as it does that the jury, without the benefit of any definition or special instructions, make a finding concerning the predictability and probability of future human behavior regarding undefined criminal acts of violence that would make him a continuing threat to society, fails to afford the jury channelled and defined guidance and instruction as to what conduct or other factors may be appropriately considered by them. This is so, notwithstanding the opinion of the United States Supreme Court in Jurek vs. Texas, 428 U.S. 262 (1976), finding the Texas Death Penalty Statute and Procedure, on its face, not violative of the 8th and 14th

amendments to the Constitution of the United States, and implicitly holding that explanatory definitions and instructions would be required to guide the jury in making determinations regarding future dangerousness of the Defendant, or the liklihood of his being a continuing threat to society, reference being made here as well to the simultaneous decisions of the United States Supreme Court in upholding the constitutionality of the grossly similar, but vastly different, statutes of the states of Georgia and Florida. Gregg vs. Georgia, 428 U.S. 153 (1976), Proffitt vs. Florida, 428 U.S. 242 (1976). The vagueness and unfettered discretion and lack of guidance born of the submission of special issue no. 2, containing as it does the undefined requirement that the jury find a "probability" remains, as does the constitutional infirmity of the entire procedure.

Such constitutional infirmity of the Texas Capital Murder Statute and complementing provisions of the Code of Criminal Procedure require that such statutes be held unconstitutional as violative of this Defendant's rights under the 8th and 14th Amendments to the Constitution of the United States.

FIFTH GROUND OF ERROR

THE TRIAL COURT ERRED IN COMPELLING THIS DEFENDANT TO EXERCISE HIS PEREMPTORY CHALLENGES, DURING VOIR DIRE EXAMINATION OF THE JURY IN ACCORDANCE WITH THE PROVISIONS OF ARTICLE 35.13, CODE OF CRIMINAL PROCEDURE, AND IN DENYING TO THIS DEFENDANT THE RIGHTS WHICH ANY DEFENDANT IN A NON-CAPITAL FELONY CASE WOULD HAVE TO SELECT A PANEL OF JURORS, NOT OTHERWISE DISQUALIFIED BY

APPENDIX H

No 6

IN THE DISTRICT COURT OF ARANSAS COUNTY
36TH JUDICIAL DISTRICT OF TEXAS

THE STATE OF TEXAS (
)
VS (NO. 1280-2
)
DOYLE EDWARD SKILLERN (

MOTION FOR CONTINUANCE

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now DOYLE EDWARD SKILLERN, Defendant in the above numbered and styled cause and files this Motion for Continuance and in support thereof would show the Court the following:

I.

Defendant is represented in this case by David B. Connery, Jr., a duly licensed and practicing member of the State Bar of Texas and is the only attorney representing this Defendant, pursuant to Defendant's affidavit of indigency and appointment by this Court at approximately 10:35 A.M. on February 20, 1978, which was the first opportunity for this Defendant and said Court appointed counsel to confer, and at which time the Court likewise set this case for trial on March 13, 1978, twenty-two (22) days from the time of appointment of counsel.

II.

This Honorable Court first made available to Defendant's counsel, by written order to the Clerk, Volumes IX through XIII of the Statement of Facts in the trial heretofore had in this cause in Live Oak County, the entire Statement of Facts consisting of Volumes I through XIV, on February 15, 1978 and subsequently by order obtained by Defendant's attorney this Court authorized release of all of the Statement of Facts, Volumes I through XIV, by order dated February 23, 1978. In this regard, Defendant would show that duplicate Statement of Facts were made, but that the responsible officials have lost or cannot find the duplicate Statement of Facts, and that it is, first, absolutely mandatory

that Defendant's counsel have access to the entire record of the former trial for review, and that the absence of the duplicate has made it mandatory that Defendant's counsel and counsel for Defendant's co-indictee, Charles Victor Sanne, share the single Statement of Facts and that by reason of prior commitments it was mandatory that counsel for Mr. Sanne have the Statement of Facts for review during the week of February 20 through February 26 inasmuch as Mr. Lee was absent from this County during the entire week of February 27 through March 3, so that Defendant's counsel could not obtain access to important parts of the Statement of Facts until approximately 6:00 P.M. on Sunday, February 26, excepting some portions on a piecemeal basis.

III.

This Court, by order dated February 22, 1978, set the date for all pre-trial hearings in this matter for March 8, 1978, at 10:30 A.M., and required each defendant to file all motions, pleadings and exceptions and all preliminary matters not later than February 27, 1978, which order was subsequently extended as to this Defendant, but nonetheless in the circumstances herein related Defendant's attorney has had insufficient time to review properly the record of former trial and prepare adequately all necessary pre-trial matters.

IV.

During the former trial hereof, the State of Texas called in excess of 50 witnesses, none of whom reside in Aransas County and most of them reside at considerable distance from Aransas County. Defendant has filed motions to require the current addresses and occupations of such witnesses as the State intends to call and adequate preparation of this case for trial requires that Defendant's counsel contact and interview such witnesses.

V.

Defendant has filed various pre-trial motions for discovery, production of evidence and examination thereof, appointment of an investigator and expert witness or witnesses, all of which the Court has set for hearing on March 8, 1978, just five days prior to the date set for trial, and even assuming that Defendant be granted all of such discovery and relief as is prayed for in such motions, there will remain insufficient time for the State's attorney to produce such matters and for Defendant's counsel to pursue workable and effective discovery and thereafter prepare adequately for the trial of this cause by March 13, 1978, and for Defendant to be put to trial in the circumstances herein related is and will amount to a denial to Defendant of the effective assistance of counsel.

VI.

Even assuming that Defendant's attorney had no other commitments and could devote the entire time from the date of appointment on February 20, 1978 until the date of trial, twenty-two (22) days is an insufficient time within which such attorney can prepare adequately to defend a capital murder case.

VII.

The testimony of a material witness in this case, Ernest M. ("Red") Andrews is material to this Defendant's defenses. This Defendant's counsel during the former trial, or counsel for Defendant's co-indictee, subpoenaed Mr. Andrews, and a Writ of Attachment was issued but unserved. It is necessary that Defendant have an opportunity to interview such witness, determine the advisability of taking his deposition, or securing his attendance upon the trial hereof. There is no reasonable expectation that the attendance of such witness can be had before this case goes to trial. Defendant expects material facts to be proved by said witness relating to a telephone conversation on the day prior to the alleged offense set

forth in the indictment herein, and it is necessary to verify such evidence and for Defendant to have the opportunity to interview such witness and obtain his deposition if necessary or secure his attendance on the trial hearing.

VIII.

This motion is not made for the purposes of delay, but so that justice may be done, following Defendant's counsel's having an adequate opportunity to obtain and pursue all necessary and appropriate discovery, secure the attendance of all necessary witnesses, and otherwise prepare adequately for the trial of a capital murder case.

WHEREFORE, premises considered, Defendant prays that this cause be continued to a day certain during this term that will permit Defendant an adequate opportunity to prepare for trial.

Respectfully submitted,

Doyle E. Skillern

DOYLE EDWARD SKILLERN, Defendant

David B. Connery, Jr.

DAVID B. CONNERY, JR.
312 North Live Oak
Post Office Box 876
Rockport, Texas 78382
(512) 729-0303
Attorney for Defendant

THE STATE OF TEXAS |
COUNTY OF ARANSAS |

Before me, the undersigned authority, personally appeared DAVID B. CONNERY, JR., Counsel for Defendant, who upon oath deposes and says that he is counsel of record for the Defendant herein and as such is fully capable, authorized, competent and qualified to make this affidavit; that he executed the same for, and on behalf of said Defendant for all purposes, and further states that the statements herein contained are true and correct.

David B. Connery, Jr.

DAVID B. CONNERY, JR.
Attorney for Defendant

SUBSCRIBED AND SWORN TO before me by the said DAVID B. CONNERY, JR., Counsel for Defendant, this the 2d day of March, 1978, to certify which witness my hand and seal of office.

Rita E. Beatty
Rita E. Beatty
Notary Public in and for
Aransas County, Texas

THE STATE OF TEXAS
COUNTY OF ARANSAS

Before me, the undersigned authority, personally appeared the Defendant in the above styled and numbered cause, who upon oath deposes and says that he is the Defendant in this cause, that he has read the foregoing Motion for Continuance and that the facts contained therein are true and correct.

Doyle E. Skillern
DOYLE EDWARD SKILLERN, Defendant

SUBSCRIBED AND SWORN TO before me by the said DOYLE EDWARD SKILLERN, Defendant, this the 2nd day of March, 1978.

Theo Johnson
Notary Public in and for
Aransas County, Texas

CERTIFICATE OF SERVICE

I, the undersigned attorney of record for Defendant DOYLE EDWARD SKILLERN, do hereby certify that a true and correct copy of the foregoing Motion for Continuance was, on this the 2 day of March, 1978, delivered to the District Attorney for the 36th Judicial District of Texas by posting same in the U. S. Mail to his address of record, San Patricio County Courthouse, Sinton, Texas.

David B. Connery
DAVID B. CONNERY, JR.

FILED
At 3:31 P.M.
MAR 2 1978
AGNES A. HARDEN
Clerk District Court, Aransas Co., Texas
By Adelia McMurray Deputy

RECEIVED
MAR 12 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

80-6322

Supreme Court, U.S.
FILED
MAR 10 1981
Alexander L. Stevas, Clerk

STATE OF TEXAS I
COUNTY OF NUECES I

AFFIDAVIT OF INDIGENCY

NOW COMES Douglas Tinker the attorney in the foregoing Petition for Writ of Certiorari and moves the Court under Rule 46 of the Rules of the Court for permission to file the attached petition for certiorari without pre-payment of costs and in support of such motion would show the Court as follows:

"I believe that Doyle Skillern is indigent and is unable to pay the costs of the filing of the attached for the following reasons:

1. Petitioner has been incarcerated since the date of his arrest for this offense on October 23, 1974. Prior to his incarceration, he owned no real nor personal property, had no bank accounts, and was totally without funds to pay his attorney in the trial of this case, either the first trial or the second.

2. Petitioner was appointed an attorney in the State court after a finding by the trial judge that he was in fact indigent under the laws of the State of Texas.

3. Douglas Tinker was appointed by the trial court to represent petitioner on Motion for Rehearing in the Court of Criminal Appeals because of the death of his prior court-appointed attorney and because he was without funds and qualified for an appointed lawyer on appeal in the State court.

By this affidavit, petitioner requests that he be permitted to file this petition without the pre-payment of costs. Douglas Tinker, the attorney for petitioner, has mailed to petitioner an affidavit in support of request to proceed in forma pauperis for his signature which will be submitted to the Court in the very near future personally signed by petitioner."

Douglas Tinker

DOUGLAS TINKER

"I, Douglas Tinker have read the foregoing Affidavit of Indigency and swear that the allegations contained therein are true and correct."

Douglas Tinker

DOUGLAS TINKER

SWORN AND SUBSCRIBED TO BEFORE ME on this the 10th day of March, 1981.

Jeanne M. Garcia

NOTARY PUBLIC in and for Nueces County, Texas

Jeanne M. Garcia
Notary Public, In And For
Nueces County, Texas

file room

80-6322

RECEIVED
MAR 27 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

STATE OF TEXAS I

COUNTY OF WALKER I

AFFIDAVIT IN SUPPORT OF REQUEST TO PROCEED IN FORMA PAUPERIS

I, DOYLE EDWARD SKILLERN being first duly sworn, depose and say that I am the petitioner in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefore; that I believe I am entitled to relief.

I further swear that the responses which I have made to questions and instructions below are true.

1. Are you presently employed? Yes ( ) No (✓)

   a. If the answer is "yes," state the amount of your salary or wages per month, and give the name and address of your employer. _____

   b. If the answer is "no," state the date of last employment and the amount of the salary and wages per month which you received. Feb. 1971 — $300.00 per month

2. Have you received within the past twelve months any money from any of the following sources?

   a. Business, profession or form of self-employment? Yes ( ) No (✓)

   b. Rent payments, interest or dividends? Yes ( ) No (✓)

   c. Pensions, annuities or life insurance payments? Yes ( ) No (✓)

   d. Gifts or inheritances? Yes ( ) No (✓)

   e. Any other sources? Yes (✓) No ( )

   If the answer to any of the above is 'yes," describe each source of money and state the amount received from each during the past twelve months. SISTER SENDS ABOUT $10.00 A MONTH

3. Do you own cash, or do you have money in a checking or savings account?

Yes (✓) No ( ) (Include any funds in prison account.) If the answer is "yes," state the total value of the items owned.
$32.00 IN PRISON ACCOUNT

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

Yes ( ) No (✓)

If the answer is "yes," describe the property and state its approximate value.

5. List the persons who are dependant upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support. NONE

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Doyle E. Skillern
DOYLE EDWARD SKILLERN

STATE OF TEXAS I

COUNTY OF WALKER I

DOYLE EDWARD SKILLERN being first duly sworn under oath, presents that he has read and subscribed to the above and states that

the information therein is true and correct.

Doyle E. Skillern

DOYLE EDWARD SKILLERN

Subscribed and sworn to before me this 16 day of March, 19 81.

J. E. Estes

Notary Public or other person
authorized to administer an oath

S. E. Estes

Comm Exp: 2-27-85

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MAY 14 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

NO. 80-6322

IN THE

SUPREME COURT OF THE UNITED STATES

ORIGINAL COPY

OCTOBER TERM, 1980

DOYLE EDWARD SKILLERN,

Petitioner

V.

THE STATE OF TEXAS,

Respondent

On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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Attorney General of Texas

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ATTORNEYS FOR RESPONDENT

NO. 80-6322

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

DOYLE EDWARD SKILLERN,

Petitioner

V.

THE STATE OF TEXAS,

Respondent

On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

NOW COMES The State of Texas, Respondent herein, by and through its attorney, the Attorney General of Texas, and in response to the petition for writ of certiorari files this Brief in Opposition.

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QUESTIONS PRESENTED

I. Whether certain of Petitioner's claims are properly before this Court.

II. Whether Petitioner was denied the effective assistance of counsel because the trial court overruled his motions for continuance and for appointment of co-counsel.

III. Whether the admission of a pathologist's testimony at the punishment phase of the trial concerning Petitioner's propensity to commit criminal acts of violence that would constitute a continuing threat to society deprived the Petitioner of any constitutionally protected right.

IV. Whether Petitioner was deprived of any constitutionally protected right by admission at the punishment phase of an indictment alleging that he had committed the offense of murder with malice, when a judgment of conviction for the offense of murder without malice also was admitted.

V. Whether a sentence of death is disproportionately severe when applied to one convicted of capital murder pursuant to the law of parties.

OPINION BELOW

The decision of the Texas Court of Criminal Appeals affirming Petitioner's conviction is reported at 609 S.W.2d 762.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES

Petitioner's claims are based on the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Also involved herein are Sections 7.01 and 7.02 of the Texas Penal Code and Article 37.071 of the Texas Code of Criminal Procedure.

STATEMENT OF THE CASE

Although in substantial agreement with Petitioner's statement of the case, Respondent wishes to correct the following misstatements and omissions:

(1) Petitioner correctly states that there was no evidence adduced to show he was in the car with his accomplice and the deceased at the time the murder was committed (Petition at 4). It is undisputed, however, that Petitioner was driving a car which was beside the deceased's car at the time of the shooting, and the State's theory of the case was that Petitioner thereby diverted the deceased's attention so that the trigger man could commit the murder.

(2) Petitioner incorrectly states that the trial court gave no reason for appointing different counsel than had represented Petitioner at the prior proceeding (Petition at 4). In denying Petitioner's motion for appointment of co-counsel, the court made the following statement:

> Well, Mr. Tinker is a great lawyer, but he is busy and engaged in Federal Court cases. I think it would be an imposition on him. This case is tried in Aransas County, and we would like to use Aransas County lawyers.
> 1/

(St.Tr. 29).

(3) Petitioner incorrectly states that counsel for his second trial was not given an opportunity to review the record of the prior trial until March 8, 1978 (Petition at 6). In fact, counsel testified that he was provided several volumes of the record of the first trial prior to his appointment on February 20, 1978 (St.Tr. 34-35).

(4) The record also reflects that counsel was able to receive advice via the telephone from Petitioner's counsel

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1/ St.Tr. refers to the transcript of Petitioner's trial.

at the prior proceeding (St.Tr. 38).

(5) Petitioner correctly states that the court admitted an indictment alleging Petitioner had committed the offense of murder with malice (Petition at 7). Petitioner neglects to mention, however, that a judgment of conviction for the offense of murder without malice also was admitted.

SUMMARY OF ARGUMENT

This Court is without jurisdiction to consider Petitioner's claims concerning the pathologist's testimony, the admission of the indictment, and the constitutionality of a sentence of death applied to one convicted under the law of parties because these contentions were not presented to the Texas Court of Criminal Appeals on direct appeal of Petitioner's conviction.

Petitioner's claims are without merit. Several of the grounds upon which Petitioner's allegation of ineffective assistance of counsel is based were not presented to the trial court in support of Petitioner's motion for continuance; consequently, nothing was presented for review to the Texas Court of Criminal Appeals, and these claims are not properly before this Court. Neither the Court's denial of Petitioner's motion for continuance nor its denial of his motion for appointment of co-counsel caused Petitioner to be denied the effective assistance of counsel. Admission of both the pathologist's testimony concerning Petitioner's propensity for future violence and the indictment for murder with malice were proper; admission of the pathologist's testimony, if error, was harmless beyond a reasonable doubt in light of the other extremely damaging evidence introduced at Petitioner's trial. A sentence of death is neither disproportionately severe nor cruel and unusual when applied to one convicted of capital murder pursuant to the law of parties.

ARGUMENT

I.

THIS COURT IS WITHOUT JURISDICTION TO CONSIDER SEVERAL OF PETITIONER'S CLAIMS BECAUSE THEY WERE NOT PRESENTED TO THE TEXAS COURT OF CRIMINAL APPEALS.

Petitioner's claims regarding admission of the pathologist's testimony concerning future dangerousness, the indictment for murder with malice, and the constitutionality of a death sentence for one convicted of capital murder pursuant to the law of parties were not presented to the Texas Court of Criminal Appeals and therefore are not properly before this Court.

Petitioner urges that admission of the pathologist's testimony and the murder indictment undermined the fairness and reliability of the fact-finding process, thereby violating his rights under the Eighth and Fourteenth Amendments (Petition at ii, 16, 20). Petitioner also asserts that death is a disproportionately severe and unconstitutional sentence for one who has not taken life or attempted or intended to do so (Petition at ii, 23). These broad constitutional claims were not presented to the Texas Court of Criminal Appeals in Petitioner's direct appeal of his conviction, nor were they passed upon by that Court.

Attached to this Brief as Appendix A is a copy of Petitioner's appellate brief to the Texas court. In his fifteenth ground of error Petitioner complained that the trial court erred in admitting Dr. Rupp's testimony because he was not qualified as an expert witness and because his testimony invaded the province of the jury (Appendix A at 19). In his twentieth ground of error, Petitioner urged that admission of the indictment was improper under the Texas Code of Criminal Procedure and therefore error (Appendix A at 36). In his fourth ground of error, Petitioner assailed the constitutionality of the Texas death penalty statute on the ground that it allowed the jury unfettered discretion

(Appendix A at 6), and in his twenty-first and twenty-second grounds of error, Petitioner complained that the court had erred in submitting the statutory special issues to the jury following the punishment phase because there was no evidence to support them (Appendix A at 37-38).

The cases are legion that this Court cannot decide issues raised for the first time on petition for writ of certiorari or upon appeal and that the Court will not decide federal questions not raised and decided in the Court below. E.g., Tacon v. Arizona, 410 U.S. 351, 352 (1973); Cardinale v. Louisiana, 394 U.S. 437, 438 (1969). In articulating this requirement, the Court has stressed the long standing nature of the rule: "[I]n Crowell v. Randell, 10 Pet. 368 (1836), Justice Story reviewed the earlier cases commencing with Owings v. Norwood's Lessee, 5 Cranch 344 (1809), and came to the conclusion that the Judiciary Act of 1789, 20, § 25, 1 Stat. 85, vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. 'If both of these do not appear on the record, the appellate jurisdiction fails.' 10 Pet. 368, 391." Cardinale v. Louisiana, at 439. Respondent submits that in view of Petitioner's failure to raise the federal issues presented here below, the failure of the state court to pass on those issues, the desirability of giving the state the first opportunity to address those issues, and the fact that a federal habeas remedy remains if no state procedure for raising those issues is available to Petitioner, the application for certiorari as to those issues should be denied for want of jurisdiction. Cardinale v. Louisiana, at 439.

II.

THE TRIAL COURT'S DENIAL OF PETITIONER'S MOTIONS FOR CONTINUANCE AND FOR APPOINTMENT OF CO-COUNSEL DID NOT CAUSE PETITIONER TO BE DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL.

A. Counsel was afforded ample time to prepare for trial, and Petitioner was not prejudiced by the court's denial of his motion for continuance.

Petitioner urges that this Court should grant the writ to decide whether the late appointment of counsel is so inherently prejudicial as to make out a prima facie showing of ineffective assistance (Petition at 10-11). Respondent submits that such a rule can have no application to the circumstances herein, and that the instant case is therefore manifestly unsuitable for determination of this question. That this is so may be discerned from the very decisions upon which Petitioner relies, Twiford v. Peyton, 372 F.2d 670 (4th Cir. 1967) and United States Ex Rel. Mathis v. Rundle, 394 F.2d 748 (3rd Cir. 1968). In Twiford, the Court of Appeals found demonstrable prejudice where counsel was appointed the day before trial and thus was unable to secure the presence of a material witness:

> In the case at bar, beyond proof of the facts showing inherent prejudice, appellant testified, without contradiction by the Commonwealth, that Frances Randall may have provided an alibi for one charge and a basis for attacking the credibility of a chief prosecution witness on both charges.

Id. at 673 (emphasis added). It is also important to note that in Twiford, counsel moved for a continuance specifically so that the witness could be made available. Id. at 672. In Rundle, the Court of Appeals found no inherent prejudice, even though counsel was appointed the eve of trial and did not have a chance to interview his client. 394 F.2d at 753.

Petitioner herein, by contrast, was appointed counsel several weeks in advance of trial; [2/] counsel was able to

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2/ Thus, counsel was provided in excess of the ten days afforded appointed counsel as a matter of statutory right. See, Tex. Code Crim. Pro. Ann. art. 26.04(b).

confer with Petitioner and review the record of Petitioner's prior trial. The only basis Petitioner presented to the trial court in support of his motion for continuance was that he needed more time to familiarize himself with the facts of the case. Further, and more important, Petitioner has failed to show that he was prejudiced by the representation of which he now complains. In rejecting this very contention, the Texas appellate court reasoned as follows:

> The failure to grant a motion for continuance is the subject of Skillern's first ground of error. Like Sanne, he focuses upon a short time given to prepare his defense and his lack of familiarity with the record of the first trial as the chief factors authorizing the continuance. He did not, however, offer proof of facts which the denial of his motion prevented him from discovering and proving, nor did he at any time state with specificity how any lack of familiarity with the record in the first trial adversely affected his handling of the instant prosecution. Skillern's claim that assistance of counsel was rendered ineffective by failing to grant the continuance is not firmly founded or supported by the record.

609 S.W.2d at 776. Petitioner's allegations of prejudice (Petition at 14) are insubstantial at best and appear in large part to involve matters of trial strategy which cannot support a finding of ineffective assistance. Moreover, Petitioner's claim that counsel's failure to make certain objections was due to the court's denial of the motion for continuance is sheer speculation. Petitioner has utterly failed to demonstrate any causal relationship between denial of the motion for continuance and trial counsel's allegedly faulty conduct of his defense.

B. Petitioner does not have a constitutional right to more than one appointed counsel or to appointed counsel of his own choosing.

Petitioner boldly asserts that the trial court's denial of his motion for appointment of co-counsel caused him to be

denied the effective assistance of counsel. Petitioner fails to cite any authority, however, for the proposition that an indigent defendant is entitled to more than one appointed attorney or to a particular appointed counsel. A number of the Courts of Appeals have held that such a right does not exist and that the decision of which counsel to appoint an indigent defendant is addressed to the sound discretion of the trial court. United States v. Poulack, 556 F.2d 83 (1st Cir.), cert. denied, 434 U.S. 986 (1977); United States v. Tortora, 464 F.2d 1202 (2nd Cir.), cert. denied, 409 U.S. 1063 (1972); United States v. Brown, 591 F.2d 307 (5th Cir.), cert. denied, 442 U.S. 913 (1979); United States v. White, 451 F.2d 1225 (6th Cir. 1971); United States v. Davis, 604 F.2d 474 (7th Cir. 1979); United States v. Vargas-Martinez, 569 F.2d 1102 (9th Cir. 1978). This rule is based on the sound policy that a defendant's freedom of choice of counsel should not be manipulated to subvert the orderly procedure of the courts or to interfere with the fair administration of justice. See United States v. Sexton, 473 F.2d 512 (5th Cir. 1973); ABA Standards, Providing Defense Services § 2.3, comment b (Approved Draft, 1968).

As stated above, the trial court denied Petitioner's motion for additional counsel because the attorney whom Petitioner wished to represent him was engaged in other proceedings. Also as discussed above, Petitioner's allegations of prejudice are both insubstantial and not shown to be related to the trial court's denial of the motion for co-counsel. The Texas Court of Criminal Appeals specifically so found in overruling this ground of error on appeal. 609 S.W.2d at 777. Petitioner has failed to raise a substantial constitutional question worthy of this Court's consideration.

III.

PETITIONER'S CLAIM REGARDING THE PATHOLOGIST'S TESTIMONY ON FUTURE DANGEROUSNESS FAILS TO RAISE A SUBSTANTIAL CONSTITUTIONAL QUESTION.

Petitioner complains of the testimony of Dr. Joseph C. Rupp, a forensic pathologist, that Petitioner was likely to commit future acts of criminal violence that would constitute a continuing threat to society. [3] Specifically, Petitioner asks this Court to hold that the admission of Dr. Rupp's testimony at the punishment phase of his trial constituted error of constitutional dimension because it "severely undermined the fairness and reliability of the fact finding process at the penalty phase" (Petition at 16). If this claim is properly before this Court, which Respondent denies (See Part I), it is wholly without merit. This contention involves nothing more than the correctness of a state trial court's evidentiary ruling and does not raise a question worthy of this Court's consideration. Petitioner's attempt to elevate this contention to constitutional status is bottomed solely on the seriousness of the death sentence which was assessed. Apparently it is Petitioner's position that this Court sits to review every evidentiary ruling in every capital case. Surely this is not the law.

Even if this already overburdened Court were to freely grant certiorari in capital cases, the instant contention does not warrant issuance of the writ. Under Texas law, the opinion of an expert witness as to an accused's future dangerousness is admissible if the witness has "such skill,

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[3] Under the Texas death penalty statute, this issue was essential to the determination of Petitioner's punishment. See, Tex. Code Crim. Pro. Ann. art. 37.071(b)(2), (e).

knowledge or experience" about human behavior "that it was probable his opinion would be of assistance to the jury in making a factual determination of whether there was a probability that appellant would commit criminal acts of violence and be a continuing threat to society in the future." Battie v. State, 551 S.W.2d 401, 407 (Tex.Crim.App. 1977). The Texas test for the admissibility of expert testimony does not raise any federal question, however. Under Rule 702, Federal Rules of Evidence, the standard is much lower:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify hereto in the form of the opinion or otherwise.

Further, as found by the Court of Criminal Appeals, admission of Dr. Rupp's testimony was harmless beyond a reasonable doubt in light of the vast amount of other evidence properly before the jury, including Petitioner's prior conviction for murder of his own brother. 609 S.W.2d at 774.

IV.

THE JURY WAS NOT MISLED AND PETITIONER WAS NOT HARMED BY ADMISSION OF THE INDICTMENT FOR MURDER WITH MALICE BECAUSE A JUDGMENT AND SENTENCE SHOWING THAT PETITIONER WAS CONVICTED OF THE OFFENSE OF MURDER WITHOUT MALICE ALSO WERE INTRODUCED.

If Petitioner's complaint regarding admission of the indictment for murder with malice at the punishment phase of his trial is properly before this Court, which Respondent denies (See Part I), it is wholly without substance. Petitioner concedes, as he must, that admission of the indictment was entirely proper under Texas law. Petitioner fails to state, however, that the judgment and sentence showing him to have been convicted of the offense of murder without malice also

were admitted in evidence (St.Tr. 2, 770). Under these circumstances the jury could not have been misled, nor could Petitioner have been harmed. This claim is frivolous.

V.

SINCE THE JURY WAS PRESENTED WITH SUFFICIENT EVIDENCE TO FIND PETITIONER GUILTY OF THE OFFENSE OF CAPITAL MURDER PURSUANT TO THE LAW OF PARTIES, HE WAS PROPERLY CONVICTED OF THAT OFFENSE; THE DEATH SENTENCE WHICH WAS ASSESSED WAS WITHIN THE STATUTORY RANGE OF PUNISHMENT AND THEREFORE WAS NOT DISPROPORTIONATE TO THE OFFENSE.

Respondent reiterates that the precise claim asserted herein has not been presented to the Texas state courts and therefore is not properly before this Court (See Part I). Further, the facts of this case render it inappropriate for determining the constitutionality vel non of a death sentence assessed one convicted pursuant to the law of parties.

In Lockett v. Ohio, 438 U.S. 586 (1978), this Court reversed on other grounds and refused to consider this identical contention. 438 U.S. at 609 n.16. Whatever merit the claim might have had in Lockett, however, it is clear that Petitioner's contention is meritless. The petitioner in Lockett joined several others in a plan to rob a pawnshop. "No one planned to kill the pawnshop operator in the course of the robbery." 438 U.S. at 590. Lockett's role in the offense was to drive the getaway car, in which she was waiting when the murder was committed. Id.

Petitioner herein, by contrast, was involved in a criminal conspiracy designed to take the life of another, and the record reflects that he played an active role in carrying out that plan. Petitioner and his co-defendant, Charles Victor Sanne, had known each other since 1956 (St.Tr. 2494) and had been "pretty good friends" for that time (St.Tr. 2495).

They shared an apartment at the time of the offense (St.Tr. 2434, 2443) and had done at least one fifty-pound marijuana deal together prior to the offense (St.Tr. 2578). They intended to consummate a drug deal with the deceased (St.Tr. 2472-73), but "put a hold" on the deal after Petitioner was informed that the deceased might be a police informant (St.Tr. 2474-75, 2498, 2512-13, 2566). Both defendants visited the deceased in his hotel room and persuaded him to leave with them (St.Tr. 2477). Sanne and the deceased departed together in one car and Petitioner followed them (St.Tr. 2480-81, 2504, 2525). When Sanne and the deceased pulled into a roadside park and stopped, Petitioner pulled his car up to the driver's side of the deceased's car to distract him so that Sanne could kill him (St.Tr. 2483-84, 2521-22, 2583-84). After Sanne shot the deceased he told Petitioner what he had done (St.Tr. 2533), and the pair fled the scene of the crime together (St.Tr. 2489-90, 2504, 2536). Petitioner was found in possession of several items of the deceased's personal property.

Tex. Penal Code Ann. § 7.01 provides, in pertinent part, as follows:

> § 7.01. Parties to Offenses
>
> (a) A person is criminally responsible as a party to an offense if the offense is committed by his own conduct, by the conduct of another for which he is criminally responsible, or by both.
>
> (b) Each party to an offense may be charged with commission of the offense.

Tex. Penal Code Ann. § 7.02 provides, in pertinent part, as follows:

> § 7.02. Criminal Responsibility for Conduct of Another
>
> (a) A person is criminally responsible for an offense committed by the conduct of another if:

> (b) Acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense;

Respondent submits that the foregoing factual summary conclusively demonstrates Petitioner's guilt of the offense of capital murder pursuant to the Texas law of parties. The trial court charged the jury on the law of parties (St. Tr. 234) and also instructed it on the law of circumstantial evidence (St.Tr. 233), thereby enabling the jury to draw inferences supplying any lack of evidence directly connecting Petitioner with the specific acts charged in the indictment. See Pereira v. United States, 347 U.S. 1, 10 (1954); Nye & Nissen v. United States, 333 U.S. 613, 619 (1949). No constitutional infirmity exists with respect to the state's conviction of Petitioner pursuant to the law of parties:

> That states have authority to make aiders and abettors equally responsible, as a matter of law, with principals, or to enact felony-murder statutes is beyond constitutional challenge.

Lockett v. Ohio, 438 U.S. at 602.

Moreover, it is important to note that the Texas capital murder statute, the constitutionality of which was upheld by this Court in Jurek v. Texas, 428 U.S. 262 (1976), provides that one commits the offense of capital murder if he "employs another to commit the murder for remuneration or the promise of remuneration . . . " Tex. Penal Code Ann. § 19.03(3). The statue by its terms provides that one may be guilty of the offense of capital murder without actually committing the killing. Because the Texas statutory provisions defining the offense of capital murder and the law of criminal responsibility are not subject to constitutional attack, and because the

record in this cause conclusively demonstrates that Petitioner was properly convicted pursuant to those provisions, it necessarily follows that the sentence of death assessed him was neither disproportionately severe nor cruel and unusual.

CONCLUSION

For the above reasons, Respondent respectfully prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

APPENDIX A

63255

In the Court of Criminal Appeals
of The State of Texas

NO. 78-772

Doyle E. Skillern,
Appellant

Vs.

The State of Texas,
Appellee

Appeal From The 36th District
Court of Aransas County
Trial Court No. 1280-2

Appellant's Brief

FILED IN
COURT OF CRIMINAL APPEALS
NOV 16 1979
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At 9:30 A.
SEP
Clerk
By Ruby Sanchez

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

NO. 78-772

DOYLE E. SKILLERN, Appellant	§	APPEAL FROM THE 36TH DISTRICT
VS.	§	COURT OF ARANSAS COUNTY
THE STATE OF TEXAS, Appellee	§	TRIAL COURT NO. 1280-2

TO THE HONORABLE JUDGES OF THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS:

NATURE OF THE CASE

Appellant, Doyle Edward Skillern, was convicted of the offense of Capital Murder in the District Court of Aransas County, 36th Judicial District of Texas, on March 30, 1978, pursuant to jury verdict, and on March 31, 1978, pursuant the verdict of jury, his punishment was assessed at death.

Trial of this case commenced on March 13, 1978 and was completed with the verdict of the jury on punishment on March 31, 1978.

Following the Court's overruling of an Amended Motion for New Trial, Appellant and Co-Appellant, Charles Victor Sanne were formally sentenced to death at high noon on Friday, May 19, 1978.

On the trial of this cause, as well as on this appeal, Appellant has been represented by the undersigned Court-Appointed Counsel, and no one else.

FIRST GROUND OF ERROR

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR CONTINUANCE AS ORIGINALLY URGED AT PRE-TRIAL HEARING HELD ON MARCH 8, 1978, AND AS RE-URGED ON MARCH 13, 1978, PRIOR TO COMMENCEMENT OF VOIR DIRE EXAMINATION OF THE SPECIAL VENIRE, AND AS RE-URGED ON MARCH 21, 1978, FOLLOWING SELECTION OF THE JURY, COMPELLING THIS DEFENDANT TO BE PUT TO TRIAL UPON A CHARGE OF CAPITAL MURDER BY AND THROUGH COURT-APPOINTED COUNSEL TWENTY-TWO DAYS FOLLOWING APPOINTMENT OF SUCH COURT-APPOINTED COUNSEL. (Amended Motion for New Trial, 5, 14, 47).

Appellant recognizes that his Motion for Continuance is addressed to the sound discretion of the Trial Court. Reed vs. State, 244 S.W.2d 821 (1952), Article 19.01, CCP, and that good cause must be demonstrated therefor. It was, and the Trial Court abused that discretion in denying the requested continuance.

Significantly, and perhaps uniquely, the state did not object to Appellant's Motion for Continuance or to that of his Co-Defendant, Sanne, (SF-44). That was the First Motion for Continuance and was heard by the Court on March 8, 1978, only five days prior to the commencement of the trial as originally set by the Court on the appointment of the undersigned attorney for this Appellant on February 20, at which time were heard all of numerous pre-trial motions filed by this Appellant and Appellant Sanne. Skillern's counsel, as did Sanne's, took the stand under oath to testify concerning the reasons why they deemed a Continuance necessary in order to represent effectively their respective clients (SF-34-47). The entirety of Volume 2 of the Statement of Facts is referred to for a particular description of the nature and character

of the pre-trial motions filed and to the summary treatment of them by the Court, including the summary denial of Motions to Suppress Evidence without benefit of an evidentiary hearing. (SF-116-125).

Preparation for trial in a case of this magnitude required at a minimum, the study of the record of the former trial herein conducted in George West, Live Oak County, consisting of 15 volumes and several thousand pages, before counsel could make an informed and sensible determination of how to conduct the defense of this case, and by reason of the Court's having set all pre-trial motions for hearing on March 8, five days prior to the commencement of trial, even the matter of legitimate discovery of the State's evidence, and other matters encompassed in Defendant's Motion for Discovery, had to be delayed until the following day, and not in Rockport, Aransas County, but in Sinton, in the office of the District Attorney. Twenty-two days were not enough, five days following hearing of pre-trial motions were not enough, and four days following the first opportunity to see the State's evidence that was made available was certainly not enough.

Appellant refers to and incorporates herein the matters sworn to in his motion for continuance, alludes to his separate and distinct motion for the appointment of additional counsel in this regard, and says that the Court's denial of his motion for continuance was the effective denial of the effective assistance of counsel, and abuse of discretion

under the totality of the circumstances in this case that requires reversal and the remanding of this case for a new trial.

SECOND GROUND OF ERROR

THE TRIAL COURT ERRED IN OVERRULING DEFENDANT'S MOTION FOR APPOINTMENT OF ADDITIONAL COUNSEL, DENYING THIS DEFENDANT THE EFFECTIVE ASSISTANCE OF COUNSEL (Amended Motion for New Trial, 4).

Defendant, incorporates herein each and all of the matters set forth under First Ground of Error and would show that the Court's denial of his Motion to Require the Appointment of Additional Counsel in the person of Douglas Tinker, a member of the bar of Corpus Christi, and being one in the same person who was appointed to defend, and who did defend this Defendant in the first trial hereof in Live Oak County, constituted a denial of this Defendant's right to the assistance of counsel to the effective assistance of counsel, and to the assistance of chosen counsel, whether chosen by himself or by the Court, in violation of the Sixth Amendment to the United States Constitution. Harling vs. United States, Court of Appeals, District of Columbia, June 21, 1978. No prejudice need be shown, nor must Defendant show that newly appointed counsel, as of February 20, 1978, performed ineptly, or not at all, or otherwise. There is no evidence of record to demonstrate that Douglas Tinker was ever relieved of his appointment and continuing representation of this Defendant, this Defendant's Motion speaks for itself in demonstrating his efforts to secure the continued representation of Mr.

Tinker, his "chosen counsel", the denial of which is an abridgment of a constitutional right requiring reversal of this case. See also United States vs. Watson, 496, F.2d 1125 (1973). Attached hereto as Exhibit A is this Defendant's Writ of Mandamus filed in this Court in Appeal No. 55,337 together with this Defendant's Application for Temporary Restraining Order and Injuction filed in the United States District Court, Southern District of Texas, Corpus Christi Division, all seeking relief in the form of the continuation of representation by the said Douglas Tinker of this Defendant, to no avail.

Morover, in the circumstances set forth under First Ground of Error above, and recognizing that Mr. Tinker had, in preparation for the trial of this case on the first occasion, approximately two months within which to prepare, as opposed to the undersigned counsel's twenty-two days (if we count every day as an effective day, which cannot be, see first ground of error above) then certianly the denial of the appointment of additional counsel in the person of Mr. Tinker, or at least the appointment of someone as additional counsel, was a deprivation of this Defendant's constitutional right to the assistance and effective assistance of counsel. Such denial requires reversal and a new trial of this case.

THIRD GROUND OF ERROR

THE TRIAL COURT ERRED IN DENYING DEFENDANT's MOTION TO QUASH THE INDICTMENT (NO. 19) BECAUSE SUCH INDICTMENT TOGETHER WITH ALL OTHER RELEVENT AND MATERIAL RECORDS FAILED TO DISCLOSE AFFIRMATIVELY THAT SAID INDICTMENT WAS PRESENTED SUBSEQUENT TO THE DATE OF THE ALLEGED OFFENSE. (Amended Motion

for New Trial, 11).

FOURTH GROUND OF ERROR

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO QUASH INDICTMENT (NO. 20) AND IN DENYING DEFENDANT'S SPECIAL PLEA IN BAR (NO. 3) BECAUSE THE CAPITAL MURDER STATUTE OF THE STATE OF TEXAS, AS ADMINISTERED AND CONSTRUED BY THIS COURT, IS UNCONSTITUTIONAL UNDER THE 8TH AND 14TH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES. (Amended Motion for New Trial, 3, 11, and 12).

The proscription of Furman vs. Georgia and Branch vs. Texas, 408 U.S. 238 (1972) holding constitutionally defective the former Capital Murder Statute of this state, by reason of the unbridled and unfettered discretion afforded the jury in assessing the Death Penalty, has not in fact been cured by the present Capital Murder Statute, Article 19.03 of the Penal Code and the complementing sections of the Code of Criminal Procedure, Section 37.071 and the three special issues that must be answered by the jury, because such special issues, particularly special issue number 2, demanding as it does that the jury, without the benefit of any definition or special instructions, make a finding concerning the predictability and probability of future human behavior regarding undefined criminal acts of violence that would make him a continuing threat to society, fails to afford the jury channelled and defined guidance and instruction as to what conduct or other factors may be appropriately considered by them. This is so, notwithstanding the opinion of the United States Supreme Court in Jurek vs. Texas, 428 U.S. 262 (1976), finding the Texas Death Penalty Statute and Procedure, on its face, not violative of the 8th and 14th

amendments to the Constitution of the United States, and implicitly holding that explanatory definitions and instructions would be required to guide the jury in making determinations regarding future dangerousness of the Defendant, or the liklihood of his being a continuing threat to society, reference being made here as well to the simultaneous decisions of the United States Supreme Court in upholding the constitutionality of the grossly similar, but vastly different, statutes of the states of Georgia and Florida. Gregg vs. Georgia, 428 U.S. 153 (1976), Proffitt vs. Florida, 428 U.S. 242 (1976). The vagueness and unfettered discretion and lack of guidance born of the submission of special issue no. 2, containing as it does the undefined requirement that the jury find a "probability" remains, as does the constitutional infirmity of the entire procedure.

Such constitutional infirmity of the Texas Capital Murder Statute and complementing provisions of the Code of Criminal Procedure require that such statutes be held unconstitutional as violative of this Defendant's rights under the 8th and 14th Amendments to the Constitution of the United States.

FIFTH GROUND OF ERROR

THE TRIAL COURT ERRED IN COMPELLING THIS DEFENDANT TO EXERCISE HIS PEREMPTORY CHALLENGES, DURING VOIR DIRE EXAMINATION OF THE JURY IN ACCORDANCE WITH THE PROVISIONS OF ARTICLE 35.13, CODE OF CRIMINAL PROCEDURE, AND IN DENYING TO THIS DEFENDANT THE RIGHTS WHICH ANY DEFENDANT IN A NON-CAPITAL FELONY CASE WOULD HAVE TO SELECT A PANEL OF JURORS, NOT OTHERWISE DISQUALIFIED BY

PROPER CHALLENGES FOR CAUSE, AND THEN TO BE ABLE TO EXERCISE SENSIBLY AND WITH CIRCUMSPECTION AFTER VOIR DIRE OF A SUFFICIENT NUMBER, THOSE LIMITED PEREMPTORY CHALENGES AVAILABLE TO HIM, IN CONTROVENTION OF THIS DEFENDANT'S RIGHTS UNDER THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE CONSTITUTION OF THE STATE OF TEXAS AS WELL AS THE SAME CLAUSES OF THE CONSTITUTION OF THE UNITED STATES, AND ALSO IN VIOLATION OF THIS DEFENDANT'S RIGHTS TO THE ASSISTANCE OF COUNSEL AND THE EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The selection of the jury proceeded with individual examination of each veniremen separately and apart from the remainder of the special venire following which each potential jurror was passed first to the state and then to the Defendants for the exercise of challenge for cause, and upon denial thereof, for peremptory challenge. Defendant, upon conclusion of the voir dire examination of Mrs. Fowler, attempted to reserve his right to exercise any peremptory strike respecting this juror, claiming the right to exercise the limited number of peremptory strikes in the same manner that would be accorded this Defendant were the indictment and trial for a non-capital felony, and was compelled by the Court to exercise peremptory challenge at that time, or waive it. (SF-287, 288). Defendant reiterated the same objection and reiterated his claim of right. (SF-328, 329).

Articles 35.13 and 35.25 and 35.26 of the Code of Criminal Procedure do not explicitly define a procedure that must or should be followed in the selection of a jury in a Capital Murder case. Be that as it may, it is clear that the procedure contemplated by Articles 35.25 and 35.26

accord a Defendant the right to exercise his peremptory challenges following the selection of a panel of jurors, not otherwise disqualified or exempt or subject to a challenge for cause, sufficient in number so that such Defendant may, following voir dire examination of all of such jurors, look back over his list, sensibly make an assessment of which potential jurors may be the most beneficial or conversely most harmful, and then, and only then, strike from the list those whom he deems obviously most objectionable. Yet in this case, and as commonly practiced in Capital Murder cases in this state, the same right is denied a Capital Murder Defendant, as it clearly was here, for the procedure forced upon this Defendant requires an instanter determination, immediately following voir dire examination, as to whether or not to exercise such strike, or looking on down the list of potential jurors, use a crystal ball, that he has not, to guess whether or not one or more on down that list may be more or less objectionable than that juror which may indeed be forced upon him right now, should he elect not to peremptorly strike the juror on the witness stand, he must guess. the non-capital felony defendant has the right to counsel and examination of those jurors on down the list before he is put to the exercise of his peremptory challenges. That the same procedure has to be followed by the prosecutor saves it not, for the crux of the matter inheres in the invidious, unwarranted and unconstitutional classification of the Capital Murder Defendant to endure such a procedure in

contrast to the apparently prescribed, and routinely followed, method of jury selection that the non-capital felony Defendant always has.

The Constitution of this State as well as the United States, in the due process and equal protection clauses, requires that classifications be not arbitrary; this classification of the Capital Murder Defendant is arbitrary. The procedure is also arbitrary and discriminatory and denied to this Defendant the effective assistance of counsel guaranteed him by the 6th Amendment to the United States Constitution, for the same reasons recited above.

These errors require that the procedure for selection of the jury in this case be declared unlawful and unconstitutional under the constitutional provisions abovementioned.

SIXTH GROUND OF ERROR

THE TRIAL COURT ERRED IN OVERRULING THIS DEFENDANT'S CHALLANGE FOR CAUSE TO THE PROSPECTIVE JUROR, JON DIGRANES. (Amended Motion for New Trial, No. 18).

The voir dire examination of this juror is contained at pages 384-426, S.F. This Defendant's challenge for cause should have been sustained, and it was an abuse of discretion for the Court to overrule same, as it was to overrule such challenge under article 35.16, CCP, because the juror's plain remarks were to the effect that he considered an indictment to be some evidence of guilt, contrary to the Court's instruction, and because he would require the Defendant to come forward with evidence on his own behalf. S.F. 400, 403, 404, 405. This prospective juror was likewise properly

challenged for cause for the reason that he stated that he could not consider the full range of punishment, the overruling of which challenge was likewise an abuse of discretion by the Court and error under Article 35.16, CCP, the consequence of which was the forcing of this Defendant to exercise a peremptory challange.

SEVENTH GROUND OF ERROR

THE TRIAL COURT ERRED IN EXCUSING PROSPECTIVE JUROR WILLARD ANDERSON, ON THE COURT'S OWN MOTION (Amended Motion for New Trial, No. 22).

The testimony of this 79 year old prospective juror on voir dire is contained at pages 689-700, S.F. It reflected a great deal of mental awareness, many sensible questions having been directed to the State's Attorney, and some minimal defect of hearing, none of which was objected to by the State nor was any challenge timely made by the State to this prospective juror. Rather, the Court took it upon itself, without the benefit of any testing, and without giving such prospective juror even the opportunity to demonstrate his ability, or the lack of it, to hear adequately a person sitting in the witness chair from a position in the jury box. No absolute disqualification having been demonstrated, and no challenge having been leveled by the State's attorney, the Court abused its discretion in excusing such prospective juror. Bodde vs. State, 568 S.W.2d 344 (1978).

EIGHTH GROUND OF ERROR

THE TRIAL COURT ERRED IN ADVISING PROSPECTIVE JUROR OLLIE GRAY, IMPLICITLY, THAT THIS DEFENDANT MAY HAVE HAD A PRIOR FELONY RECORD. (Amended Motion for New Trial, No. 23).

In response to questioning by counsel for Co-Defendant Sanne, regarding probation and the prospective juror's ability to consider the full range of punishment, the Court stated:

> "Well, have you filed a sworn statement that your clients have not been convicted of a Felony?" (S.F., 754)

Remarks by the State's attorney immediately preceding the injection of that remark by the Court properly handled the matter, as it could have in conference with the Court out of the hearing of the prospective juror. Moreover, this Defendant had not questioned any prospective juror concerning eligibility for probation. Such remark by the Court was clear advice to the juror that one or both Defendants may have a prior Felony Criminal Record. This Defendant objected to such remarks by the Court at the first opportunity out of the presence and hearing of the juror (S.F., 757).

NINTH GROUND OF ERROR

THE TRIAL COURT ERRED IN SUSTAINING THE STATE'S CHALLENGE FOR CAUSE TO PROSPECTIVE JUROR FRANK GARZA (Amended Motion for New Trial, No. 25).

The testimony of prospective juror Frank Garza on voir dire demonstrated clearly that he had consciencious scruples against the infliction of the Death Penalty. That is not, of course, enough under the decision in Witherspoon vs. Illinois, 391 U.S. 510, as this Court has recognized. Mr. Garza's testimony is contained at S.F. 950-959, and that testimony, showing that such prospective juror would not, under any and all circumstances, vote against the Death

Penalty, makes the sustaining of the State's challenge improper. See Harris vs. State, 457 S.W.2d 903 and Davis vs. Georgia, 429 U.S. 122 (1976).

TENTH GROUND OF ERROR

THE TRIAL COURT ERRED IN OVERRULING THIS DEFENDANT'S CHALLENGE FOR CAUSE TO PROSPECTIVE JUROR OSCAR GRANGER (Amended Motion for New Trial, No. 32).

Based upon the testimony given by Mr. Granger during voir dire examination, S.F. 1129-1155, it was clear that Mr. Granger had prior knowledge and considered this trial to be a re-trial based upon a technicality, that he had concluded that an essential element of the State's case was already proved, ie., that a murder had been committed (not a homicide), and that it would be incumbant upon the Defendant to produce evidence that such had not been the case, and, lastly, the prospective juror candidly admitted (S.F. 752) that such knowledge and conclusions "might necessarily effect your decision or your service as a juror in arriving at a verdict here in this case," to which the juror answered, "It's a possibility it could." It is respectfully submitted that it is nothing more than frivolous semantics, in the light of such cadid admissions of such dimension, to say that with a little more effort and rehabilitation, the juror could probably lay aside such knowledge and conclusions and try to abide by the instructions of the Court. Defendant's challenge for cause having been overruled, Defendant was put to the exercise of a peremptory strike. The Court's overruling of such challenge of cause was error under Article 35.16 CCP.

ELEVENTH GROUND OF ERROR

THE TRIAL COURT ERRED IN DENYING THIS DEFENDANT'S MOTION FOR MISTRIAL UPON EXCUSING JUROR DOROTHY TURNER AFTER SHE HAD BEEN IMPANELED AS THE FIRST JUROR, FOR MEDICAL OR HEALTH REASONS. (Amended Motion for New Trial, No. 39).

Mrs. Turner was, following voir dire examination, sworn and impanelled as the first juror in this case. S.F. 179-214. The evidence plainly demonstrated that she was not fit in fact to serve as a juror. S.F. 1343-1368. Nonetheless, without the consent of Defendant and his counsel, the Court is without authority to proceed to organize a jury by selecting another juror, and a mistrial should have been declared at that point. Houston vs. State, 287 S.W.2d 643 and Articles 35.05 and 35.16, CCP. No provision for the selection of alternates is provided. This Defendant also made objection to the Court's ruling that it would proceed to select two additional jurors, which was overruled. S.F. 1367.

TWELFTH GROUND OF ERROR

THE TRIAL COURT ERRED IN OVERRULING THIS DEFENDANT'S CHALLENGE FOR CAUSE TO PROSPECTIVE JUROR MRS. JAMES C. BRACHT AND IN DENYING THIS DEFENDANT THE RIGHT OF EFFECTIVE CROSS-EXAMINATION OF SUCH PROSPECTIVE JUROR (Amended Motion for New Trial, No. 43).

Mrs. Bracht's testimony (S.F. 1503-1533) demonstrated that she considered the necessity of another trial in this case rather silly, that she had at least an inclination to believe the Defendant's guilty and, following voir dire examination by the State's attorney and the attorney for Co-Defendant Sanne, upon attempting to determine by what is submitted to be proper questioning, what would or would not

be required to remove, if possible, such predilection from the juror's mind, upon objection by the State's attorney, this Defendant's examination of such juror was cut off (S.F. 1532), denying this Defendant the right to develop fully any proper grounds for challenge for cause, as well as cutting this Defendant off from that cross examination guaranteed him in his right to cross examine prospective jurors in order to sensibly utilize his peremptory challenges. Moveover, in view of her testimony concerning the silliness of re-trial, it is respectfully submitted that such testimony amounts to a prejudice against this Defendant, concerning which the trial Court has no discretion. The overruling of Defendant's Challenge for Cause, compelling him to exercise a peremptory strike, was error, in violation of Article 35.16, CCP, and in contravention of this Defendant's right to counsel and to the effective use of counsel under the 6th Amendment to the United States Constitution, and as well a denial of his right of cross-examination.

THIRTEENTH GROUND OF ERROR

THE TRIAL COURT ERRED IN DENYING THIS DEFENDANT'S MOTION FOR SEVERENCE AS REURGED BY THIS DEFENDANT AT THE TIME THE STATE ANNOUNCED THAT IT HAD RESTED, AT WHICH TIME CO-DEFENDANT SANNE ANNOUNCED HIS INTENTION TO TAKE THE WITNESS STAND TO TESTIFY IN HIS OWN BEHALF (Amended Motion for New Trial, No. 80).

Defendant recognizes that the granting or denial of a Motion for Severance in this instance was discretionary with the Court. Defendant submits that the trial Court abused that discretion. Until such time as Co-Defendant Sanne

announced his intention to take the stand and testify in his own behalf, and did so, S.F. 2466-2567, there was no direct evidence of this Defendant's (1) presence in the Motel room in Beeville with Co-Defendant Sanne or (2) his presence at the roadside park where the shooting took place. Permitting the trial to proceed without a severance as to this Defendant, when his Co-Defendant's testimony, in seeking to establish the defense of self-defense, put this Defendant in the motel room, provided evidence upon which the jury could conclude that this Defendant acted in concert with Co-Defendant Sanne in what transpired at the scene of the shooting at the roadside park, and in which State was permitted to cross-examine the Co-Defendant Sanne, eliciting thereby evidence of extraneous offenses committed not simply by Co-Defendant Sanne, but by this Defendant as well, namely, extraneous offenses done together in concluding drug deals, fronted, or otherwise, theft of an automobile, etc., was extremely prejudicial to this Defendant, and was an abuse of discretion by the Court. Article 36.09, CCP.

FOURTEENTH GROUND OF ERROR

THE TRIAL COURT ERRED IN DENYING THIS DEFENDANT'S MOTION TO SUPPRESS EVIDENCE BY REASON OF UNLAWFUL SEARCH AND SEIZURE AND ARREST AND IN ADMITTING INTO EVIDENCE, OVER THIS DEFENDANT'S OBJECTION, ALL EVIDENCE SEIZED AND/OR OBTAINED AS A RESULT THEREOF. (Amended Motion for New Trial, Nos. 61, 62, 63, 64, 65, 66, 67, 68, 69: 46-49, inclusive: 73).

Having denied both Defendants the opportunity to develop evidence on their Motion to Suppress prior to the commencement of trial, nonetheless the Court did permit a hearing out of

the presence of the jury during the course of the trial in which the State called as its witness one Hector Sanchez (S.F. 2055-2084). Mr. Sanchez testimony reflected that he had received a telephone call from agent Dennis Vickery, asking that he do Mr. Vickery a favor and keep on the lookout for the Camaro vehicle, believed to be driven by and occupied by this Defendant and Co-Defendant Sanne, as well as agent Randel's vehicle, at once advising that agent Randel was engaged in an undercover operation and that agent Randel had departed around 7:00 p.m. in the evening, Mr. Vickery's call to Mr. Sanchez having been at approximately 10:45 p.m. Mr. Sanchez testified that agent Vickery told him nothing about the two Defendants, but advised him to be on the lookout around Gary Jackson's house. (S.F. 2055-2057). Mr. Sanchez then obtained the assistance of Mr. Trevino and his partner, Tom Daniel, and located the Camaro vehicle at a 7-11 store in Harlingen (S.F. 2058) at approximately 12:05 a.m., whereupon Mr. Trevino called the Department of Public Safety to obtain a vehicle registration check on the Camaro automobile, which was received within minutes of first finding the Camaro at the 7-11 store (S.F. 2070). Not until some 15 or 20 minutes later, after following the Camaro vehicle from the 7-11 store, and only after concluding that the vehicle was indeed going to Gary Jackson's house, did Mr. Sanchez and the other officers stop the Camaro vehicle which this Defendant drove. Mr. Sanchez testified that if, in fact, the reportedly stolen nature of the automobile had

been his reason for stopping the Camaro vehicle and its occupants, he would indeed have done so immediately upon ascertaining the stolen character of the vehicle. (S.F. 2072). Moreover, officer Sanchez testified that he had sufficient time to get a warrant (S.F. 2075).

Notwithstanding the Court's attempts to characterize the evidence as indicating flight of these Defendants, the plain testimony of the officer negates any such inference, for he only stopped the Camaro vehicle on concluding that it was going to Gary Jackson's house and that it would be more difficult for him to carry out his purpose at Jackson's house, officer Sanchez avowing that he knew Jackson's reputation. It is likewise plain that officer Sanchez had abandoned, as a basis for his stopping the Camaro vehicle, the reportedly stolen character of the vehicle, else he would have done it instanter at the 7-11 store. There remains evidence of only one reason for stopping the Camaro vehicle: that was the telephone call and the information related therein from agent Vickery to agent Sanchez. That contained no information about this Defendant or his Co-Defendant. Officer Sanchez testified that he stopped the vehicle soley and conclusively by reason of the contents of that communication from agent Vickery, plus his years of experience. That testimony can permit of one inference: an inarticulate hunch which led to an unconstitutional arrest and search. Benton vs. State, 576 S.W.2d 374, Tunnell vs. State, 554 S.W.2d 697, Terry vs. Ohio, 20 L.Ed.2d. 889. Certainly an investigatory stop and

the officer's concomitant right to perform a frisk or pat search for weapons can in no wise permit a general exploratory search of the vehicle, as was done in this case. It was purely officer Sanchez' hunch that Randel might well occupy the vehicle. It is also clear from his testimony that the weapon found on Defendant Skillern's person formed no basis for the subsequent search or the arrest, for it was not a until the following morning that he recalled and communicated to another agent his having seen a similar weapon in possession of agent Randel at some time in the past in Portland.

There having been time to obtain a warrant, during the surveillance by three officers in two vehicles, officer Sanchez having abandoned any basis in the reportedly stolen character of a vehicle as a reason for his stopping same, and having no more than an inarticulate hunch based upon agent Vickery's communication to him for such stop, the subsequent arrest and all evidence obtained as a result thereof were clearly inadmissible. Wong Sun vs. U.S., 371 U.S. 471.

FIFTEENTH GROUND OF ERROR

THE TRIAL COURT ERRED IN ADMITTING IN EVIDENCE OVER THIS DEFENDANT'S OBJECTION, THE TESTIMONY OF DOCTOR JOSEPH C. RUPP IN ITS ENTIRETY DURING THE PUNISHMENT PHASE OF THIS TRIAL BECAUSE DOCTOR RUPP WAS SHOWN TO BE INCOMPETENT TO RENDER THE OPINION TESTIMONY THAT HE DID, AND SUCH TESTIMONY INVADED THE PROVINCE OF THE JURY. (Amended Motion for New Trial, No. 101).

Although qualified during the guilt or innocence stage of this trial as a forensic pathologist and having testified

that he has been a professional pathologist since approximately 1961, engaging solely and exclusively in that specialty, nonetheless some opinions rendered by Doctor Rupp during the guilt or innocence stage of the trial (S.F. 1692-1742) would appear strained, namely, anyone's ability to render an opinion after the fact of the actions of the decedent prior to his death, nonetheless those opinions were admitted in evidence.

However, during the punishment phase of this trial, Doctor Rupp testified (S.F. 2816-2850), in sum, that he possessed no professional degrees or experience in the fields of psychiatry or psychology. The trial court denied this Defendant the right to Counsel and the right to cross-examination of this witness in attempting to question him regarding his qualifications to engage in the practice of psychiatry and indeed assumed the role of the prosecutor in this instance, the witness' repeated remarks being only that he was liscenced to practice medicine and surgery in the State of Texas.

In order to authorize the use by the prosecution of Doctor Rupp's testimony concerning the predictability of future human behavior, it was necessary that the trial court determine that behavior patterns of this Defendant "are so related to some scientific profession as to be beyond the knowledge of the average layman;" and that Doctor Rupp had such skill, knowledge or experience in the field of psychiatry that it was probable his opinion would be of assistance to

the jury in making a factual determination of whether there was a probability that Skillern would commit criminal acts of violence and be a continuing threat to society in the future. Battie vs. State, 551 S.W.2d 401. Thus, the trial court would have to conclude based upon common knowledge, and implicitly, that there being no evidence of any type of examination of this Defendant, psychiatric or otherwise by any medical practitioner, that this Defendant's behavior patterns were beyond the knowledge of layman, and that Doctor Rupp's knowledge and experience in the field of predictability of future human behavior would assist the jury. The record is silent. It contains no evidence whatsoever upon which anyone could find that Doctor Rupp possessed such qualifications. Patently, cutting up dead bodies, weighing brains and livers, and examining tissues under a microscope during a professional career of almost 20 years, does not, in the common knowledge of anyone, qualify one to predict, without benefit of any examination of the Defendant, future human behavior. Indeed, the General Practitioner referred to by Doctor Rupp as commonly treating emotional problems of patients, would clearly be more qualified than Doctor Rupp in that regard. If the entire field of psychiatric expertise be questioned concerning the validity of such an ability to predict future dangerousness, 30 Baylor Law Review 35, 55 Texas Law Review 1343, including recognition of the plain fact that empirical studies have demonstrated that such opinions are not accurate, how much less credible can be the

opinions of a professional pathologist.

There was simply no basis, either in common knowledge, or in evidence, upon which the trial Court could find Doctor Rupp qualified to render such opinion testimony. Its prejudicial effect was incalculable. Smith vs. Estelle, 445 F. Supp. 647 (U.S. District Court, Dallas, 1977) condemned, at least, the surprise element. The admission of incompetent expert testimony concerning the crucial special issue no. 2 in a Capital Murder case, special no. 1 and 3 having in effect been already determined by the guilt or innocence phase of the trial, cannot be said to be harmless, particularly when it came from the same mouth that rendered opinion testimony concerning the "deliberateness" in effect on the guilt or innocence stage.

SIXTEENTH GROUND OF ERROR

THE TRIAL COURT ERRED IN ADMITTING IN EVIDENCE THE TESTIMONY OF EVA GONZALES OF AN EXTRANEOUS CRIMINAL TRANSACTION AS WELL AS THE TESTIMONY OF ERNEST M. "RED" ANDREWS IN THAT REGARD AND CONCERNING A 38 CALIBER SMITH AND WESSON REVOLVER. (Amended Motion for New Trial, No. 58, and 78).

The testimony of Miss Gonzales (S.F. 1999-2013) and that of Ernest M. "Red" Andrews (S.F. 2431-2459) effectively informed the jury that Miss Gonzales' automobile had been reported stolen by her, following her having loaned it to the Defendants on at least one occasion, that Red Andrews had been with the Defendants when a key was made with which to operate the Camaro vehicle belonging to Eva Gonzales, and the obtaining by these Defendants of a 38 caliber Smith & Wesson revolver (States Exhibit No. 57) and this Defendant's

handling and firing the gun at Red Andrews' home in Austin, Texas.

The evidence of these two witnesses as related above did not bear on any contested issue of fact, including identity, but was introduced for, and showed only, the commission of an extraneous criminal transaction. Such was prejudicial error, allowing the jury to consider evidence of criminal transactions not revelent or material to any issue upon the trial of this case, to this Defendant's prejudice. Coleman vs. State, Court of Criminal Appeals No. 55242 (11-8-78), Powell vs. State, 478 S.W.2d 95. To the same effect was the evidence brought out on cross examination of Co-Defendant Sanne (S.F. 2492-2556) regarding other drug transactions, and implicating this Defendant therein.

SEVENTEENTH GROUND OF ERROR

TRIAL COURT ERRED IN ADMITTING IN EVIDENCE OVER THIS DEFENDANT'S OBJECTION, STATE'S EXHIBITS NOS. 31A, 21, 29, 57, 63, 64, 60, AND 62, AND 51 AND 65-71, INCLUSIVE, ALL OF SUCH EVIDENCE HAVING BEEN ADMITTED IN VIOLATION OF THE RULES OF EVIDENCE PRESCRIBED BY THE CODE OF CRIMINAL PROCEDURE, THE CUMULATIVE EFFECT HAVING BEEN PREJUDICIAL TO THIS DEFENDANT'S RIGHT TO BE TRIED UPON, AND BE CONFRONTED WITH, LEGALLY COMPETANT EVIDENCE. (Amended Motion for New Trial, Nos. 50, 51, 53, 54, 56, 57, 62, 70, 71, 74, 82 and 83).

EXHIBIT 31A: Exhibit 31A was introduced through the testimony of the State's initial witness, one Candace Franklin (S.F. 1634-1656), showing the body of the decedent in an automobile. Miss Franklin had testified that she saw no one in the automobile she had observed at the roadside park. Having tried this case once, the State well knew that it had

ample and sufficient witnesses who could and would identify the person of the decedent as the occupant of the vehicle, close in time to the observations of Miss Franklin. Her testimony having been incompetent to place the decedent in the automobile at the time of her observation, the only purpose for which such evidence was offered, and admitted over objection, was to inflame prejudice in the minds of the jurors. Such exhibit was not an accurate portrayal or representation of what the witness had observed. Cavazos v. State, 365 S.W.2d 178, Whaley v. State, 367 S.W.2d 703.

EXHIBIT 21: This exhibit was admitted through the testimony of agent James Dalrymple (S.F. 1761-1791) over the objections of Defendant. Agent Dalrymple testified that he found exhibit 21 on agent Randal's desk on the day on which the decedent's body was found at about 9:05 a.m., and that during the preceding evening, at his desk some 8 feet distant from agent Randal's desk, he observed agent Randal make a telephone call and contemporaneously write something. Agent Dalrymple did not identify exhibit 21 contemporaneously with agent Randal's presumeably having made it, but simply found it on his desk the following morning. He could identify agent Randal's handwriting from many years experience, but obviously agent Dalrymple could not testify to what was communicated to agent Randal in the telephone conversation, if it be presumed that agent Randal was writing down what was in fact communicated to him in such telephone conversation, for that would be hearsay. Exhibit 21 was not qualified as

any type of record or memorandum made in the ordinary course of business by agent Randall, and on its face it obviously cannot qualify as such. Exhibit 21 was simply an attempt to circumvent the hearsay nature of the telephone conversation by agent Randal with an unidentified third party. Moreover, that memorandum, exhibit 21, cannot qualify as a memorandum of past recollection recorded, for to do so would be to say that agent Dalrymple is qualified to testify that if the decedent Randal were here, he could not relate what was communicated to him in the telephone conversation, again assuming that he wrote down something respecting that telephone conversation, and that he made such a memorandum comtemporaneously with it and recognizes it as such. Exhibit 21, under any characterization of the evidence, was patently inadmissable hearsay, forming a link of identification with Gary Jackson and containing obvious writings referring to drugs. Moreover, it is submitted that agent Dalrymple's testimony shows, his having been seated at a distance of some eight feet, that he could not possibly identify the writing contained in Exhibit 21 as having been made by agent Randal at the time about which he testified, as opposed to having been made at some other time. The admission of this exhibit was in violation of the Rules of Evidence as prescribed by Article 38.01 Code of Criminal Procedure.

EXHIBIT 29: This exhibit, consisting of two pages of what perported to be serial numbers of United States currency in the handwriting of agent Dennis Vickery, and identified

as such by him (S.F. 1864-1973) was erroneously introduced because such document was clearly hearsay, as developed for the first time during cross-examination of agent Vickery at which time Defendant moved that it be stricken. The evidence clearly established that agent Dennis Vickery did not personally observe the serial numbers or the currency in the hands of agent Randal, who was seated at the opposite end of the bed, but simply wrote down and made a memorandum of what was recited orally to him by agent Randal. The admission of such testimony and exhibit 29, and the overruling of this Defendant's motion for mistrial because of that admission, was error, and its admission was erroneous under Article 38.01, Code of Criminal Procedure. Compounding the error was the trial court's admission, over this Defendant's objection, of agent Vickery's testimony as to having next seen the currency represented by State's exhibit 29 at the Harlengen Police Department on October 24, 1974, and likewise overruling this Defendant's Motion for Mistrial.

EXHIBIT 57: This exhibit, a 38 caliber revolver, was admitted over the objection of Defendant following the testimony of Ranger James R. Peters (S.F. 2032-2055). No proper predicate was made for the introduction of such revolver because there was no identification of it as being the revolver that belonged to this Defendant or to the Defendants jointly, or otherwise, it simply being a 38 caliber revolver, and the fact that other testimony demonstrated that agent Randel was killed by bullets fired from a

38 caliber revolver in no wise lends any credence to that fact being connected with this particular revolver. The introduction of this exhibit was erroneous, in violation of Article 38.01, Code of Criminal Procedure.

EXHIBIT 63 & 64: These exhibits were the test bullets fired by balistics expert Fred Rymer of the Department of Public Safety (S.F. 2297-2344). His testimony reflected that his examination and testing could not demonstrate anything more than the fact that the bullets were fired from a Smith & Wesson revolver of a general type, of which the 38 caliber revolver (State's exhibit 57) was one of a given number, as opposed to the bullets having been fired from a revolver of different manufacture, for example, Colt, of which a like number had been manufactured, or approximately so. The introduction of such exhibits was in violation of Article 38.01, Code of Criminal Procedure.

EXHIBITS 60 & 62: These two photographs, both of the decedent's body as seated in the Pontiac automobile were cumulative and of no probative value other than to inflame prejudice in the minds of the jurors, and were admitted in evidence, over Defendant's objection. They were of no probative value in tending to prove or disprove any prosecution theory or disputed issue of fact, and their introduction in evidence was error in violation of Article 38.01, Code of Criminal Procedure.

EXHIBITS 51, 65-71, inclusive: These exhibits, introduced through the testimony of Ranger Glenn Krueger (S.F. 2272-

2297, 2600-2649) were clearly inadmissable and of no probative value in tending to prove any prosecution theory or disputed issue of fact, all being diagrams of what was otherwise physically described and photographed. Opinion testimony by Ranger Krueger concerning apparent crossing of tire tracks at the roadside park was error, all after the State's witnesses admitted that examination and testing of the samples made from the tire tracks were inconclusive and of no probative value in tending to connect the Camaro automobile operated by this Defendant with that which was at the roadside park. The introduction of such testimony and the exhibits was error in violation of Article 38.01, Code of Criminal Procedure.

EIGHTEENTH GROUND OF ERROR

THE TRIAL COURT ERRED IN ADMITTING IN EVIDENCE, OVER THIS DEFENDANT'S OBJECTION, THE TESTIMONY OF CRUZ SANCHEZ CONCERNING DEFENDANT SANNE'S REPUTATION FOR TRUTH AND VERACITY AND IN OVERRULING THIS DEFENDANT'S MOTION FOR MISTRIAL FOLLOWING THE STRIKING AND INSTRUCTION TO THE JURY TO DISREGARD ONE QUESTION PROPOUNDED TO THIS WITNESS BY THE PROSECUTOR. (Amended Motion for New Trial, No. 84).

The testimony of Corpus Christi Police Officer Cruz Sanchez called as a rebuttal witness by the State to rebut and diminish the credibility of Co-Defendant Sanne following his having taken the witness stand, is contained in S.F. 2651-2665. The Court having first denied both Defendants the right to determine whether or not the proper predicate could be laid by the State for the introduction of Officer Sanchez' testimony to the effect of that Co-Defendant Sanne's reputation for truth and veracity was bad, on voir dire out of the presence and hearing of the jury, stating

that the Defendants could develop that on cross-examination, the State was permitted to introduce such testimony in evidence without laying any predicate respecting where, and for what period of time, or inclusive periods of time, the officer knew, or could gain knowledge of Sanne's reputation for truthfulness and veracity. The State was further permitted to ask, and the witness to answer, to the effect that Co-Defendant Sanne would not be entitled to belief under oath, according to his reputation.

On cross-examination, finally in voir dire, it was developed that Officer Sanchez based his entire testimony upon his investigation of something back in 1971, that he had no knowledge concerning any community in which Defendant Sanne thereafter resided. The withdrawal by the State of the second question as to whether or not Mr. Sanne's reputation would allow him to be entitled to be believed under oath, and the admonition to the jury to disregard it, could not cure the error, for the obvious reason that there was no predicate made for the introduction of any testimony at all by officer Sanchez, and therefore the entire testimony was incompetent and prejudicial, and a mistrial should have been declared. Article 38.01, Code of Criminal Procedure.

NINETEENTH GROUND OF ERROR

THE TRIAL COURT ERRED IN OVERRULING THIS DEFENDANT'S OBJECTIONS TO THE COURT'S CHARGE AND IN FAILING TO GRANT DEFENDANT'S SPECIALLY REQUESTED CHARGES AND DEFINITIONS DURING THE GUILT OR INNOCENCE PHASE OF THE TRIAL.

1. The Court erred in failing to accurately set forth

the law applicable to the case in paragraph 1 of the charge in defining the offense of Capital Murder, and in paragraph 2 in defining the offense of Murder, because such portions of the charge, although abstractly defining the offenses, would permit the jury to infer that the offense charged in the indictment was committed by either committing the offense of robbery, or attempting to commit the offense of robbery, when the indictment charged both: "in the course of committing and attempting to commit robbery;" and in both paragraphs 1 and 2 in failing to charge the jury that the offenses of Capital Murder or Murder must be committed without legal justification. The same basic objections apply to paragraph 3 of the charge.

2. The Court erred, in paragraph 4 of the charge in rendering certain definitions, to accurately set forth the law applicable to the case, particularly respecting the definition of "conspiracy", because such definition essentially submitted an issue not raised by the evidence or charged by the indictment and wholly failed to exclude any consideration by the jury of the conduct of this Defendant respecting his actions with Co-Defendant Sanne in attempting to commit what is plainly a felony offense, namely, the arranging of a sale of illegal drugs, in consideration of what would, under the charge contained in the indictment, constitute a conspiracy, for the jury could plainly consider that under such definition if this Defendant engaged in conduct with his Co-Defendant that would constitute <u>any</u> felony offense, including drug

transactions, that indeed he would be "acting together" as charged in the indictment and be a guilty conspirator, and such definition was, therefore, also a comment upon the weight of the evidence. The same error carries over into paragraph 5 of the charge, in failing to exclude from the jury's consideration the same evidence of conduct that could amount to a felony in defining the requirements of circumstantial evidence. Paragraph 5 was, therefore, likewise a comment upon the weight of the evidence.

3. The Court erred in Paragraph 6 of its charge, defining criminal responsibility of one for the conduct of another, again because it failed wholly to diferentiate "the offense" concerning which it would be necessary for the jury to find that this Defendant acted with intent to promote or assist another in commission of "the offense", permitting the jury, by its failure to exclude from their consideration, to consider any evidence, an abundance of which there was, of Defendant Skillern's acting together with Defendant Sanne in an illicit drug transaction, or the furtherance thereof, with agent Randel, in permitting the jury to consider that if this Defendant's conduct was committed in furtherance of the "unlawful purpose", not necessarily that charged in the indictment, (robbery and attempted robbery) that he would be guilty of a conspiracy and acting together with Co-Defendant Sanne, and such charge was therefore a comment upon the weight of evidence and permitted the jury to consider as evidence of guilt conduct by this Defendant not charged in

the indictment.

4. The Court erred in Paragraph 7 of the charge in failing to distinctly set forth the law applicable to the facts of the case, and in commenting upon the weight of the evidence, because the very same definition of criminal responsibility as contained in Paragraph 6 is carried forward specifically in Paragraph 7, in attempting to apply the abstract law to the conduct in question, thus again permitting the jury to find that if the Defendant Skillern engaged in conduct that would constitute any felony, not necessarily the commission and attempting to commit robbery as charged in the indictment, that he would be a party to the offense committed by Defendant Sanne. It should be noted further that Paragraph 7 of the charge specifically negated the application of the law of self-defense as availing Defendant Skillern anything, in consideration of the issues submitted to the jury during the punishment phase as hereinafter noted.

5. The Court erred in Paragraph 8 of the charge in failing to accurately set forth the law applicable to the case, for the same reasons hereinabove stated, and for the further reason that Paragraph 8 submitted an issue not raised by the evidence, there having been none that this Defendant acted alone and it is further a comment upon the weight of the evidence because the same conduct and charge had essentially been made in Paragraph 7 of the charge.

6. The Court erred in failing to distinctly set forth

the law applicable to the case in Paragraph 9A of the charge and in applying it to the issues raised by the evidence again, by failing to exclude from the jury's consideration this Defendant's presence in the Beeville area for the purpose of making a drug sale from their consideration of his conduct in acting with his Co-Defendant as a "party", and such charge was, therefore, also a comment upon the weight of the evidence. The Court also erred in its charge under all of the remaining subdivisions of Paragraph 9, respecting voluntary manslaughter, legal justification for the use of deadly force, because such charge in effect would permit the jury to give this Defendant the benefit of the defense of the conduct of his Co-Defendant respecting voluntary manslaughter, but not self-defense, for the Court had theretofore, in Paragraph 7, denied to this Defendant the applicability of the law of self-defense in attempting to apply the law to the facts. The charge wholly failed to correctly apply the applicable law to the case and to the issues raised by the evidence, because from the outset, as herein above enumerated, it failed to tell the jury that the offense of murder must be committed without justification in the first instance, and in failing to carry forward that basic premise, effectively denying the jury's consideration of this Defendant's conduct and any justification available to him as a defense.

7. The Court erred in Paragraph 10 of the charge in failing to distinctly set forth the law applicable to the

case and the issues raised by the evidence again in failing to exclude from the jury's consideration all acts or declarations made by Co-Defendant Sanne respecting a contemplated drug sale, and such charge was therefore a comment upon the weight of the evidence.

8. The Court erred in Paragraph 15 of the charge, in failing to accurately apply the law applicable to the case for such charge would permit the jury to consider as evidence statements of counsel for the State made during the course of the trial or during argument, unless the jury found that such were not supported by the evidence, or arguments or statements concerning the law unless the jury found that such were not in harmony with the law contained in the charge, and such paragraph was therefore misleading and confusing, and constituted a comment upon the weight of the evidence by the Court.

9. The Court erred in denying this Defendant's specially requested instruction, applying the law accurately to the case and the issues raised by the evidence, and specially requiring the jury to find, among other things, that this Defendant's conduct as a "party" would have to be with the intention to promote or assist his Co-Defendant in the commission of the offense of robbery or the attempt to commit such offense.

10. The Court erred in refusing this Defendant's specially requested instructions, in connection with the definition of criminal responsibility of one person for the

conduct of another, respecting mere association by a person on trial with another, mere knowledge of the commission of a crime standing alone, and mere possession by one of property belonging to another standing alone, and mere presence of this Defendant at the scene of a crime.

Each and all of the foregoing errors by the Court in its charge, both of omission and commission, were prejudicial to this Defendant's right to be tried upon the charge made by the indictment, and the legally competent evidence introduced in support of such charge, in accordance with article 36.14, Code of Criminal Procedure.

TWENTIETH GROUND OF ERROR

THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE, OVER THIS DEFENDANT'S OBJECTION, STATE'S EXHIBIT 74, THE INDICTMENT ALLEGING MURDER WITH MALICE AFORETHOUGHT OF ONE MILTON SKILLERN, DURING THE PUNISHMENT PHASE OF THE TRIAL, AND LIKEWISE IN ADMITTING THE TESTIMONY OF ERNEST M. "RED" ANDREWS DURING THE PUNISHMENT PHASE OF THE TRIAL. (Amended Motion for New Trial, Nos. 95, 97 & 98).

Article 37.07 and 37.071, Code of Criminal Procedure, govern, and permit the introduction in evidence, respectively, of the Defendant's prior criminal record and "any matter that the Court deems relevent to sentence." As to prior criminal record, the term is specially defined in Section 3(a) of Article 37.07 to mean "a final conviction in a court of record." Defendant did not object to the admissability of the judgment and sentence that followed the indictment which is State's Exhibit 74, for they demonstrated the final conviction of this Defendant for the offense of murder without malice, but it is submitted that the term "conviction"

as used in Article 37.07 means simply what it says and excludes from consideration by the jury that with which the Defendant was charged, the universal rule being that an indictment is no evidence of guilt. To allow in evidence the indictment for murder with malice aforethought was to inform the jury and permit it to consider to some extent details of an offense charged, but of which the Defendant was not finally convicted. Notwithstanding this Court's opinion in Knox v. State, 487 S.W.2d 322, to the effect that the pleadings, including indictment, complaint and information are admissible in demonstrating an accused's "prior criminal record", it is submitted that such "holding" was dicta, wholly unnecessary to the determination made in that case.

The testimony of Ernest M. "Red" Andrews during the punishment phase respecting joking conversations concerning this Defendant's brother's body, the pooring of concrete over it, and comments respecting such deceased brother's wife, were likewise incompetent, beyond the purview of "prior criminal record", and were introduced solely to show details of such prior offense, and equally as prejudicial was Mr. Andrew's testimony concerning the trip made by this Defendant, Co-Defendant Sanne and Mr. Andrews to Houston, permitting the jury to infer and speculate upon something that never occurred (other than a drive to Houston) and to speculate on extraneous offenses as based upon Mr. Andrew's own interpretation and opinion of the comments made by

this Defendant or his Co-Defendant.

TWENTY-FIRST GROUND OF ERROR

THE TRIAL COURT ERRED, DURING THE PUNISHMENT PHASE OF THE TRIAL, IN ITS CHARGE IN SUBMITTING TO THE JURY SPECIAL ISSUE NO. 1 AND SPECIAL ISSUE NO. 3, AS DEFINED IN ARTICLE 37.071, CODE OF CRIMINAL PROCEDURE, BECAUSE IN THE CONTEXT OF THE PROSECUTION'S THEORY OF THE CASE THERE WAS NO EVIDENCE AND NO LEGALLY COMPETENT EVIDENCE TO SUPPORT THE SUBMISSION OF SUCH ISSUES. (Amended Motion for New Trial, Nos. 102, 103 & 105).

Special issue No. 1, as submitted in this case, and as obviously contemplated in its statutory formulation, must require conduct by and accused that "caused the death of the deceased" and its deliberate commission with the reasonable expectation that the death of the deceased or someone would follow. The entire theory upon which this case was tried, as clearly reflected by the charge of the Court on the guilt or innocence phase of the trial, took into account the admitted shooting of the decedent by Co-Defendant Sanne, as claimed in self-defense, and without any definition or explanatory instruction there was no competent evidence to submit to the jury concerning the deliberateness of this Defendant's conduct or any matter encompassed within Special Issue No. 1. Indeed, the submission of the statutory special issue, without more, in this case and upon the theory on which it was tried, would permit the jury to consider the conduct of Co-Defendant Sanne in determining whether or not there was conduct by this Defendant that caused the death or that it was committed deliberately and with the reasonable expectation of death. The same argument applies to the

submission of Special Issue No. 3, for the only evidence raising such issue was the testimony of Co-Defendant Sanne respecting his claim of having been struck in the face with a pistol by the decedent, and to submit such special issue with regards to this Defendant again prejudiced him because it permitted the jury to consider again the conduct of Co-Defendant Sanne, in the context of the entire charge on punishment. Rather than putting an additional burden on the State to prove yet another special issue, it simply permitted the State to argue, and the jury to consider, another's conduct when there was no evidence of any conduct by Defendant Skillern in response to any provocation by the deceased.

TWENTY-SECOND GROUND OF ERROR

THE TRIAL COURT ERRED IN SUBMITTING SPECIAL ISSUE NO. 2 DURING THE PUNISHMENT PHASE OF THIS TRIAL BECAUSE THERE WAS NO EVIDENCE AND NO LEGALLY COMPETENT EVIDENCE TO SUPPORT THE SUBMISSION OF SUCH ISSUE. (Amended Motion for New Trial, No. 103).

Defendant refers to his arguments hereinabove respecting the introduction of the indictment in his former trial in which he was convicted of the offense of murder without malice, the introduction and evidence of the testimony of Ernest M. "Red" Andrews, and to the testimony of Doctor Rupp as being totally incompetent, and further says that the Court's failure to define in plain and intelligible language the meaning of "probability" and "criminal acts of violence" was likewise error.

TWENTY-THIRD GROUND OF ERROR

THE TRIAL COURT ERRED ON NUMEROUS OCCASIONS, DURING VOIR DIRE EXAMINATION OF THE SPECIAL VENIRE,

DURING THE GUILT OR INNOCENCE STAGE OF THE TRIAL, AND DURING THE PUNISHMENT PHASE OF THE TRIAL, IN ASSUMING THE ROLE OF THE PROSECUTION, DENYING THIS DEFENDANT HIS RIGHT OF CROSS-EXAMINATION OF WITNESSES, ALL EFFECTIVELY DENYING THIS DEFENDANT THE ASSISTANCE OF COUNSEL AND THE EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED HIM BY THE SIXTH AMMENDMENT, UNITED STATES CONSTITUTION. (Amended Motion for New Trial, No. 107).

This Defendant specially invokes the mandate contained in Article 37.071 of the Code of Criminal Procedure to review by this Court of the judgment and sentence, and the sufficiency of any evidence to support it. By way of illustration, and not by way of limitation, Defendant refers to the testimony of Doctor Rupp during the punishment phase of this trial, and to the Court's interruption of cross-examination of such witness, and the effective denial thereof (S.F. 2835-2838) in which the Court in so many words told the jury that the conduct of this Defendant's counsel was improper in the manner of cross-examination of Doctor Rupp, without there having been advanced any objection by the State's attorney, the calling of Doctor Rupp for such opinion testimony having been a surprise in the first instance, followed by the Court having denied counsel time to prepare for cross-examination of such witness who concluded his testimony on direct examination at noon. U.S. v. Candelaria-Gonzalez, 547 F.2d 291 (5th Cir. 1977). The record will disclose other instances.

CONCLUSION

Defendant-Appellant, Doyle E. Skillern, respectfully submits that each and all of the foregoing errors reflect a denial of due process, violation of the specific provisions

of the Code of Criminal Procedure where cited, denied this Defendant the assistance of counsel and the effective assistance of counsel, and if not individually, then certainly in their cumulative effect. Knapp v. State, 311 F.2d 71.

Wherefore, premises considered, Appellant prays that this cause be reversed and remanded for a new trial.

Respectfully submitted,

By David B. Connery

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CERTIFICATE OF SERVICE

I certify that on this 13th day of September, 1979, I mailed copies of the above and foregoing Brief by United States Postal Service, postage prepaid to Mr. Tom Bridges, District Attorney, San Patricio County Courthouse, Sinton, Texas 78387 and to Mr. Charles D. Butts, Special Prosecutor, 401 Jack White Way, San Antonio, Texas 78205.

By David B. Connery

David B. Connery, Jr.